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## GOODWILL AND GOING-CONCERN VALUE: EMERGING FACTORS IN THE JUST COMPENSATION EQUATION†

LYNDA J. OSWALD\*

### INTRODUCTION

A few decades ago, a flurry of law review articles appeared that sharply criticized the time-honored practice in American law of denying compensation to business owners whose business interests were damaged or destroyed by a condemnation of the underlying land.<sup>1</sup> These commentators called for reform in the law, for a recognition of the devastation and loss such a policy inflicts upon business owners. Once the problem was exposed and solutions pro-

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<sup>1</sup> See generally Aloï & Goldberg, *A Reexamination of Value, Good Will, and Business Losses in Eminent Domain*, 53 CORNELL L. REV. 604 (1968); Kanner, *When is "Property" not "Property Itself": A Critical Examination of the Bases of Denial of Compensation for Loss of Goodwill in Eminent Domain*, 6 CAL. W.L. REV. 57 (1969); Kratovil & Harrison, *Eminent Domain—Policy and Concept*, 42 CALIF. L. REV. 596 (1954); Spies & McCoid, *Recovery of Consequential Damages in Eminent Domain*, 48 VA. L. REV. 437 (1962); Comment, *"Just Compensation" for the Small Businessman*, 2 COLUM. J.L. & SOC. PROBS. 144 (1966); Comment, *An Act to Provide Compensation for Loss of Goodwill Resulting from Eminent Domain Proceedings*, 3 HARV. J. ON LEGIS. 445 (1965); Comment, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61 (1957) [hereinafter Comment, *Incidental Losses*].

For a comprehensive and annotated list of publications on this topic through 1982, see Risinger, *Direct Damages: The Lost Key to Constitutional Just Compensation When Business Premises are Condemned*, 15 SETON HALL L. REV. 483 app. (1985).

posed, though not implemented, the scholars shifted their focus elsewhere. Little attention has been paid to business losses since.<sup>2</sup> Interestingly, however, the reforms urged so vehemently twenty and thirty years ago are now starting to materialize, not in a tidal wave of change, perhaps, but certainly in a groundswell. A number of state courts<sup>3</sup> and legislatures<sup>4</sup> have begun to recognize that losses of goodwill, going-concern value, or profits are real losses for which the property owners should be compensated.

As urban centers in the United States endeavor to reindustrialize, public and private entities are increasingly condemning urban land for redevelopment in an effort to spur economic renewal.<sup>5</sup> As a result, the issue of business losses is growing in importance. Even a single urban renewal project or private industrial scheme can displace hundreds of businesses and thousands of people,<sup>6</sup> causing millions of dollars in damages,<sup>7</sup> much of which will not, because of

<sup>2</sup> The most recent article is Risinger, *supra* note 1, which discusses business losses only in the context of federal law.

<sup>3</sup> See *infra* notes 259-401 and accompanying text.

<sup>4</sup> See *infra* notes 174-258 and accompanying text.

<sup>5</sup> Many of these projects are joint public/private endeavors. See generally Freilich & Nichols, *Public/Private Partnerships in Joint Development: The Legal and Financial Anatomy of Large-Scale Urban Development Projects*, 1986 INST. ON PLAN., ZONING & EMINENT DOMAIN ch. 1; Gold, *Economic Development Projects: A Perspective*, 19 URB. LAW. 193 (Spring 1987); Mandelker, *Public Entrepreneurship: A Legal Primer*, 15 REAL EST. L.J. 3 (1987).

<sup>6</sup> For example, the General Motors Poletown Project in Michigan resulted in the taking of "1,176 buildings, homes, apartments, and businesses, including 16 churches, 3 schools, and a hospital." Comment, *Corporate Prerogative, "Public Use" and a People's Plight: Poletown Neighborhood Council v. City of Detroit*, 1982 DET. C.L. REV. 907, 909-10 (footnote omitted); see also *Community Redev. Agency v. Abrams*, 15 Cal. 3d 813, 825-26, 543 P.2d 905, 914, 126 Cal. Rptr. 473, 482 (1975), *cert. denied*, 429 U.S. 869 (1976). The court stated:

We judicially notice the following as facts "of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute": The conditions of modern American life, including the increased concentration of people in urban centers and the need for increased governmental activity in the areas of transportation and urban redevelopment, have resulted in the disruption and displacement of increased numbers of people and businesses by government projects. Moreover, the peculiar nature of urban redevelopment programs, which act upon large areas of contiguous property, often involves the uprooting of entire neighborhoods and the consequent dispersal of their business and residential occupants to other areas.

15 Cal. 3d at 825-26, 543 P.2d at 914, 126 Cal. Rptr. at 482. (citations omitted).

<sup>7</sup> For example, the projected public sector costs for the Poletown Project were over \$200 million, including acquisition costs of \$62 million and relocation costs of \$25.75 million. See *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 656 n.7, 304 N.W.2d 455, 469 n.7 (Ryan, J., dissenting); see also *Luber v. Milwaukee County*, 47 Wis. 2d 271, 280, 177 N.W.2d 380, 385 (1970). The *Luber* court noted:

Due to the fact people are often congregated in given areas and that we have reached a state wherein re-development is necessary, commercial and industrial

the vagaries of the law, be compensable. Thus, the time is ripe for not only reexamining the historical basis and theoretical underpinnings of the business losses rule, but also for analyzing the nascent trend toward allowing recovery of business losses.

Part I of this article describes, by way of example, the business losses rule and the issues it presents, and defines the key terms and concepts.<sup>8</sup> The business losses rule arose from the economic circumstances of the early republic, and from the early definitions given to the terms "property" and "taking." Part II traces the evolution of these legal terms and the historical background of eminent domain law in general, and the business losses rule in particular.<sup>9</sup> Part III analyzes both the rationales offered by courts in denying recovery for such losses and the two major exceptions to the general rule that have emerged.<sup>10</sup> The current status of the business losses rule is examined in Part IV, and legislative, judicial, and constitutional reforms that have led to a rejection or restriction of the rule in some jurisdictions are evaluated.<sup>11</sup> Finally, Part V presents the policy, economic, and equity arguments in favor of rejecting the traditional business losses rule.<sup>12</sup>

### I. THE PROBLEM DEFINED

The most effective means for conveying the very real and deleterious consequences that the business losses rule has upon business owners is to begin the discussion with an example of the rule in operation. Let us suppose that a sixty-four year old man has been a pharmacist for over forty years; he, in fact, has never practiced another profession. For the past twenty-seven years, he has owned and operated a pharmacy in a low-income, inner-city neighborhood. He draws his clientele from the surrounding area, has earned the trust and respect of the community, and has become, in a sense, a neighborhood "fixture."

The city then determines that the area is decaying and is in need of redevelopment. It formulates an urban renewal project and

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property is often taken in condemnation proceedings. When such property is taken, incidental damages are very apt to occur and in some cases exceed the fair market value of the actual physical property taken.

47 Wis. 2d at 280, 177 N.W.2d at 385.

<sup>8</sup> See *infra* notes 13-43 and accompanying text.

<sup>9</sup> See *infra* notes 44-119 and accompanying text.

<sup>10</sup> See *infra* notes 120-72 and accompanying text.

<sup>11</sup> See *infra* notes 173-452 and accompanying text.

<sup>12</sup> See *infra* notes 453-515 and accompanying text.

condemns a twenty square block area. In so doing, the city not only takes the pharmacy, it destroys the entire neighborhood. The city offers the pharmacist the fair market value of the real estate upon which the pharmacy is located and of his fixtures—an amount totaling, say, \$50,000.

"But wait!" Our hypothetical pharmacist argues. "I am not receiving full compensation here. I did not own 'real property and fixtures.' I owned a pharmacy business. Yesterday, before the condemnation, I could have sold that business for \$75,000. Today, the city has condemned my property, destroyed the neighborhood in which I operate, and dispersed my client base, yet it offers me only \$50,000 in exchange. I have lost \$25,000, the value of the business I built over the last twenty-seven years, and I have no compensation to show for it. Moreover, I am sixty-four years old and I have rheumatoid arthritis. There is no way I can reestablish or relocate my business. How can this be the 'just compensation' the Constitution mandates?"<sup>13</sup>

Unfortunately for our pharmacist, that is precisely the result that most courts would reach today. This is the business losses rule. It states that when the government condemns the real property upon which a business is operated, the owner recovers only the value of the real property and the fixtures taken.<sup>14</sup> But what of the numerous other losses associated with the taking of property on which a business is located? What recovery is allowed for items such as loss of profits during the relocation period, permanent reduction in profits because of the loss of an advantageous location, or the complete destruction of goodwill or going-concern value where a

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<sup>13</sup> With a few embellishments, these are the facts of *Community Redevelopment Agency v. Abrams*. See 15 Cal. 3d at 817-18, 543 P.2d at 908, 126 Cal. Rptr. at 476. For the tale of a pharmacist who fared somewhat better in similar circumstances, see *infra* notes 343-47 and accompanying text (discussing *City of Detroit v. Michael's Prescriptions*, 143 Mich. App. 808, 373 N.W.2d 219 (1985)).

<sup>14</sup> See generally 4 J. SACKMAN, NICHOLS' THE LAW OF EMINENT DOMAIN § 13.3, at p. 13-182 (rev. 3d ed. 1990) [hereinafter NICHOLS].

Some states allow evidence concerning a business carried on at the condemned property to be admitted to show the market value of the property involved, even though they do not allow recovery for the actual loss of business. *E.g.*, *Restaurants, Inc. v. City of Wilmington*, 274 A.2d 137, 138 (Del. 1971); *City of St. Louis v. Union Quarry & Constr. Co.*, 394 S.W.2d 300, 305-06 (Mo. 1965); *State ex rel. Dep't of Highways v. Robb*, 454 P.2d 313, 315-16 (Okla. 1969); *State v. Sungrowth VI, Calif. Ltd.*, 713 S.W.2d 175, 177 (Tex. Ct. App. 1986). Not all states, however, allow such evidence. *E.g.*, *A.G. Davis Ice Co. v. United States*, 362 F.2d 934, 937 (1st Cir. 1966); *Kayo Oil Co. v. State*, 340 So. 2d 756, 759 (Ala. 1976); *Bailey v. Boston & P. R.R.*, 182 Mass. 537, 539, 66 N.E. 203, 204 (1903); *Mississippi State Highway Comm'n v. Rogers*, 236 Miss. 800, 807, 112 So. 2d 250, 252-53 (1959).

business cannot be relocated because the owner lacks the capital, credit, education, or physical health to start anew? The news for most business owners is grim: they may not recover for such losses, even though they may find it prohibitively expensive, or even impossible, to relocate their businesses in other locations.

Depending upon the definition used by the court involved, business losses can take a number of forms, including loss of profits, whether temporary or permanent, loss of goodwill or going-concern value, and relocation or removal expenses. Perhaps the most troublesome losses, at least in terms of condemnation law, are loss of goodwill and loss of going-concern value, for these are the losses that most directly reflect the inherent value of the business. Goodwill and going-concern value are frequently viewed as ephemeral concepts, however, and therefore undeserving of a remedy. The failure of many courts and commentators to distinguish between these two closely-related, but separate, components of business value contributes to the confusion that marks this area of the law.

"Goodwill" refers to the "value which inheres in the fixed and favorable consideration of customers, arising from an established and well-known and well-conducted business."<sup>15</sup> As one court noted, "[s]uch excess of value is nothing more than the recognition that, used in an established business that has won the favor of its customers, the tangibles may be expected to earn in the future as they have in the past."<sup>16</sup> Because "goodwill" is the value attributable to the favorable consideration of the customers,<sup>17</sup> it can exist even where the business does not make a profit.<sup>18</sup> In recent years, how-

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<sup>15</sup> *Los Angeles Gas & Elec. Corp. v. Railroad Comm'n*, 289 U.S. 287, 313 (1933) (citations omitted). Judge Story defined "goodwill" as:

[T]he advantage or benefit, which is acquired by an establishment, beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement, which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices.

STORY, *PARTNERSHIP* ch. VI, § 99, at 170 (6th ed. 1868).

<sup>16</sup> *Haberle Crystal Springs Brewing Co. v. Clarke*, 30 F.2d 219, 221-22 (2d Cir. 1929), *rev'd on other grounds*, 280 U.S. 384 (1930).

<sup>17</sup> *Metropolitan Bank v. St. Louis Dispatch Co.*, 149 U.S. 436, 446 (1893); *In re Brown*, 242 N.Y. 1, 6, 150 N.E. 581, 582 (1926) ("Men will pay for any privilege that gives a reasonable expectancy of preference in the race of competition. Such expectancy may come from succession in place or name or otherwise to a business that has won the favor of its customers. It is then known as good will.") (citation omitted).

<sup>18</sup> See, e.g., *Engstrom v. Larson*, 77 N.D. 541, 560, 44 N.W.2d 97, 108 (1950). The court stated:

ever, the definition of "goodwill" has evolved beyond this simple notion of patronage.<sup>19</sup> For example, for purposes of tax law, goodwill is often defined as the excess earning power of a business,<sup>20</sup> i.e., the value of elements such as trade names, trade brands, market acceptance, and established location that together create an expectancy of earnings in excess of the normal returns on the tangible assets.<sup>21</sup>

"Going-concern value," on the other hand, refers to "the many advantages inherent in acquiring an operating business as compared to starting a new business with only land, buildings and equipment in place."<sup>22</sup> Although goodwill can be measured by "capitalization

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[N]either the fact that the business is very profitable or successful, nor that it is not a very profitable and even a losing business, is the only test of good will . . . in view of the fact that good will may be said to be a desire of old clients to resort or return and continue business relations where the clients have been accustomed to do business.

*Id.* (quoting *Macfadden v. Jenkins*, 40 N.D. 422, 444-45, 169 N.W. 151, 156 (1918)). See also *Mathews v. Division of Admin.*, 324 So. 2d 664, 667 (Fla. Dist. Ct. App. 1975). The Iowa Supreme Court distinguished "profits" from "goodwill" as follows:

Profits are the gains realized from trade; good-will is that which brings trade. A favorable location of a mercantile establishment, or the habit of customers to resort to a particular locality, will bring trade. This advantage may be designated by the term "good-will." What the trader gains from the trade so acquired are profits.

*Carey v. Gunnison*, 17 N.W. 881, 885 (Iowa 1883).

<sup>19</sup> See generally Courtis, *Business Goodwill: Conceptual Clarification via Accounting, Legal and Etymological Perspectives*, 10 ACCTG. HISTORIANS J., Fall, 1983, at 1.

<sup>20</sup> See Rev. Rul. 59-60, 1959-1 C.B. 237, 241, which states:

The presence of goodwill and its value, therefore, rests upon the excess of net earnings over and above a fair return on the net tangible assets. While the element of goodwill may be based primarily on earnings, such factors as the prestige and renown of the business, the ownership of a trade or brand name, and a record of successful operation over a prolonged period in a particular locality, also may furnish support for the inclusion of intangible value.

*Id.*; see also Danzig & Robinson, *Going Concern Value Reexamined*, 11 TAX ADVISER 32, 33 (1980) (defining goodwill as "the expectation of earnings in excess of fair or normal return on the capital invested in tangible assets and certain other means of production").

<sup>21</sup> According to one commentator:

[T]he phenomenon of customer loyalty, or habitual return, unaccompanied by some measure of economic success or potential for excess earnings, does not indicate the presence of goodwill . . . . It is only when public confidence, financial and commercial credit, and the other elements of competitive advantage produce earnings, or their potential, in excess of normal returns that the element of goodwill can be isolated.

Note, *Amortization of Intangibles: An Examination of the Tax Treatment of Purchased Goodwill*, 81 HARV. L. REV. 859, 860 (1968) (footnote omitted). See generally Blaine, *Valuation of Goodwill and Going Concern Value*, MERGERS & ACQUISITIONS, Spring 1979, at 4, 4-5; Paulsen, *Goodwill and Going Concern Value Reconsidered*, MERGERS & ACQUISITIONS, Winter 1980, at 10, 10-12; Danzig & Robinson, *supra* note 20, at 33-34.

<sup>22</sup> *Gray Line Bus Co. v. Greater Bridgeport Transit Dist.*, 188 Conn. 417, 422, 449 A.2d

of business earnings *in excess of* a normal industry-wide rate of return" on the capital assets,<sup>23</sup> going-concern value reflects the enhanced value of assets arising from their combination within an operating business.<sup>24</sup> Going-concern value is created by such factors as "avoidance of start-up costs, increased operating efficiency, and increased marketing and administration efficiencies."<sup>25</sup> Unlike goodwill, which reflects the existence or expectation of *excess* earnings, going-concern value reflects only the ability of a going business to realize a higher rate of return than a newly established firm.<sup>26</sup>

Although the two concepts are intellectually distinct and are recognized as such in taxation and accounting literature,<sup>27</sup> the courts often view the distinction as a minor one in the area of eminent domain.<sup>28</sup> In theory, the distinction between goodwill and going-

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1036, 1039 (1982) (citations omitted); *see also* *City of Omaha v. Omaha Water Co.*, 218 U.S. 180, 202 (1910).

<sup>23</sup> Comment, *Depreciability of Going Concern Value*, 122 U. PA. L. REV. 484, 485 (1973) (emphasis in original) (footnote omitted).

<sup>24</sup> In 1933, the United States Supreme Court distinguished between the two concepts as follows:

This Court has declared it to be self-evident "that there is an element of value in an assembled and established plant, doing business and earning money, over one not thus advanced," and that this element of value is "a property right" which should be considered "in determining the value of the property upon which the owner has a right to make a fair return." The going value thus recognized is not to be confused with good will, in the sense of that "element of value which inheres in the fixed and favorable consideration of customers, arising from an established and well-known and well-conducted business . . ."

*Los Angeles Gas & Elec. Co. v. Railroad Comm'n*, 289 U.S. 287, 313 (1933) (citations omitted).

<sup>25</sup> Paulsen, *supra* note 21, at 12. Other commentators noted that "going concern value is associated with the process of assembling a management and labor organization, acquiring and assembling an efficient productive plant, conducting preliminary research and development, acquiring a source of capital, and developing a marketing operation." Danzig & Robinson, *supra* note 20, at 34.

<sup>26</sup> *See* Gomes, *Excess Earnings, Competitive Advantage, and Goodwill Value*, J. OF SMALL BUS. MGMT., July 1988, at 22, 29.

<sup>27</sup> *See, e.g.,* Doernberg & Hall, *The Tax Treatment of Going-Concern Value*, 52 GEO. WASH. L. REV. 353, 355-57 (1984); Schnee & Cargile, *Going Concern Value—A New Intangible?*, 15 TAX ADVISER 386, 387 (1984); Wiener, *Going Concern Value: Goodwill by Any Other Name?*, 33 TAX LAW. 183, 184 (1979); Comment, *supra* note 23, at 484.

<sup>28</sup> For example, Justice Marshall of the Wisconsin Supreme Court noted:

The difficulty created by trying to distinguish between going value and good will might well be avoided. Why indulge in a technical difference, which, from a broad standpoint, is a mere play on words? In a broad sense, good will is, after all, the value which attends and characterizes a business as a going industry and has developed and become attached thereto in the course of time. Why discard an element of property under one name which must be taken back into another as a matter of justice and of constitutional right?

*Appleton Water Works Co. v. Railroad Comm'n*, 154 Wis. 121, 155-56, 142 N.W. 476, 487 (1913) (Marshall, J., concurring).



concern value should vary only the calculations used to determine the compensation available.<sup>29</sup> If the court or legislature admits that compensation is available for one of these intangible assets, provided, of course, that the evidentiary requirements are met, it should allow recovery for both, because the concepts are analytically so similar. In practice, however, the courts<sup>30</sup> and legislatures<sup>31</sup> often allow recovery for one of these items without addressing the availability of recovery for the other. It is often unclear whether they intend such a dichotomous and inconsistent result, or whether they consider the two terms to be interchangeable.<sup>32</sup>

The terminology used to label these losses can also be confusing. In the literature, business losses may be referred to as either "consequential damages"<sup>33</sup> or "incidental damages."<sup>34</sup> The term "consequential damages" itself is a somewhat ambiguous term in the eminent domain field.<sup>35</sup> Historically, "consequential damages," in the context of condemnation law, denoted losses suffered by a property owner when either direct government action or private action authorized by the government resulted in injury unaccom-

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<sup>29</sup> The two concepts are valued differently. See generally Blaine, *supra* note 21; Danzig & Robinson, *supra* note 20; Desmond, *Valuing the Loss of Business Goodwill*, 45 APPRAISAL J. 193 (1977) (discussing only valuation of goodwill); Paulsen, *supra* note 21.

<sup>30</sup> See, e.g., *infra* notes 281-311 and accompanying text (Minnesota); *infra* notes 312-47 and accompanying text (Michigan).

<sup>31</sup> See, e.g., *infra* notes 226-58 and accompanying text (California and Wyoming).

<sup>32</sup> In analyzing the cases, I simply adopt the label given the losses by the court involved, without inquiring into the accuracy of the classification.

<sup>33</sup> E.g., Searles & Raphael, *Current Trends in the Law of Condemnation*, 27 FORDHAM L. REV. 529, 546-47 & n.62 (1958-59); Spies & McCoid, *supra* note 1, at 441; Comment, *The Doctrine of Consequential Loss as Affected by Valuation Formulas*, IV LAND & WATER L. REV. 539, 539-40 (1969); Comment, *Consequential Damages and "Just Compensation" in Federal Condemnations*, 18 U. CHI. L. REV. 349, 349-50 (1950-51).

<sup>34</sup> E.g., Phay, *The Eminent Domain Procedure of North Carolina: The Need for Legislative Action*, 45 N.C.L. REV. 587, 622 n.116 (1967); Comment, *Non-Compensable Business Losses in Eminent Domain Proceedings: A Time for Re-evaluation*, 46 TEMP. L.Q. 72, 73 (1972); Comment, *Incidental Losses*, *supra* note 1, at 61-62. Some commentators use these two terms interchangeably. See, e.g., McCormick, *The Measure of Compensation in Eminent Domain*, 17 MINN. L. REV. 461, 476, 480-81 (1933).

<sup>35</sup> As NICHOLS states:

[consequential damage] means both damage which is so remote as not to be actionable, and damage which is actionable. Sometimes the term is used to denote damage which, through [sic] actionable, does not follow in point of time upon the doing of the act complained of. The term has been characterized as consequential damage to an actionable degree. The distinction seems to be between less and more remote damage, and, in the last analysis, seems to be purely a matter of degree.

4A NICHOLS, *supra* note 14, § 14.01, at p. 14-6 (footnote omitted).

panied by a physical "taking" of property.<sup>36</sup> The term has since evolved to include damages occurring when the condemnor takes only a part of the condemnee's real property, even though such losses might more properly be called "severance damages."<sup>37</sup> "Incidental damages," on the other hand, "describe nonphysical property losses to the condemnee, usually occurring when the entire fee is taken,"<sup>38</sup> such as removal costs, losses caused by an inability to relocate a business, interruption of business, or a complete loss of business altogether. Although these injuries may impose a substantial financial burden on the property owner, he or she generally does not receive reimbursement for them.<sup>39</sup>

Some commentators<sup>40</sup> and courts<sup>41</sup> do distinguish between consequential and incidental damages and carefully place business losses in the latter category. The distinction is an important one, because it acknowledges that business losses do arise from an actual taking of physical property and are not merely an unintended consequence of some other type of government action, such as the use of the police power.<sup>42</sup> The psychological barriers raised by the term "consequential" should not be underestimated—it is much easier to deny recovery for unintended losses flowing from a legitimate government action that did not rise to the level of a taking than it is to say that intangible losses resulting from what is undeniably a taking are somehow noncompensable. To the extent scholars and the judiciary misuse or confuse the terms, they obscure the true nature of the loss. Because the terms often are used inconsis-

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<sup>36</sup> See 3 T. SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES § 1113 (9th ed. 1920); Rogers, *Partial Taking*, APPRAISAL J. 393, 394 (1957) (quoting G. SCHMUTZ, CONDEMNATION APPRAISAL HANDBOOK 127 (1949)). For example, consequential damages historically included losses resulting from government activities such as removal of lateral support or obstruction or relocation of highways. See A. JAHR, LAW OF EMINENT DOMAIN: VALUATION AND PROCEDURE §§ 50-58 (1953). The distinction, however, is by no means clear. For example, the United States Supreme Court has referred to damages such as future loss of profits and removal expenses as "consequential losses." *United States v. General Motors Corp.*, 323 U.S. 373, 379 (1945).

<sup>37</sup> See Comment, *Incidental Losses*, *supra* note 1, at 82 n.96. On severance damages, see generally 4A NICHOLS, *supra* note 14, § 14.01[3], at pp. 14-37 to 14-42.

<sup>38</sup> Comment, *Incidental Losses*, *supra* note 1, at 61 n.4.

<sup>39</sup> A. JAHR, *supra* note 36, § 111.

<sup>40</sup> See, e.g., 1 L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN ch. v n.1 (2d ed. 1953); Comment, *Incidental Losses*, *supra* note 1, at 61-62 & n.4.

<sup>41</sup> See, e.g., *State v. Hammer*, 550 P.2d 820, 823 n.2 (Alaska 1976).

<sup>42</sup> Business losses, thankfully, can be analyzed without delving into the morass known as "regulatory takings." For a discussion of regulatory takings, see generally Peterson, *The Takings Clause: In Search of Underlying Principles Part I: A Critique of Current Takings Clause Doctrine*, 77 CALIF. L. REV. 1299 (1989).

tently in the literature and court opinions, it is important to analyze carefully the actual type of loss the court or commentator is describing, and not to rely solely upon the label given it.

The law is clear that a physical appropriation of tangible property results in a direct taking for which the government owes direct damages.<sup>43</sup> Business losses, on the other hand, because of their intangible nature, pose much more difficult issues. Although these losses arise directly out of a physical taking, they themselves are nonphysical in nature, and hence are considered noncompensable in most jurisdictions. The hodgepodge of imprecise and confusing terms used in this field makes analysis of these conflicting rules difficult. It is hardly surprising that, given the lack of intellectual clarity regarding the fundamental definitions of the key concepts, the legal rationales underlying the business losses rule are also so murky.

## II. THE HISTORICAL EVOLUTION OF THE BUSINESS LOSSES RULE

Generally, the two major constraints on the sovereign's use of the eminent domain power are the public use doctrine and the just compensation requirement. The public use doctrine, however, has seldom functioned as a significant safeguard against abuses of the eminent domain power. A century ago, a cautious judiciary was hesitant to invoke the public use doctrine to restrain a nation intent on industrializing. Today, when large-scale takings intended to foster economic redevelopment and renewal and to bolster decaying urban centers are common, the public use doctrine provides even less protection for business owners. Courts have not been sympathetic to business owners' arguments that mass takings designed to encourage private investment do not satisfy the public purpose requirement.<sup>44</sup> Thus, aggrieved property owners seeking legal reform and redress for their business losses must instead focus attention upon the nature of the "just compensation" they receive, rather than the use to which their property will be put by the sovereign. The problem they face, of course, is that business losses historically have been excluded from the just compensation equation.

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<sup>43</sup> 2 NICHOLS, *supra* note 14, § 6.05.

<sup>44</sup> See, e.g., *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 631-35, 304 N.W.2d 455, 458-60 (1981).

### A. *The Historical Background of Eminent Domain Law*

Most of the early cases involving eminent domain disputes arose in the state courts, under state constitutional or statutory law. Indeed, it was not until 1875 that the United States Supreme Court definitively established that the federal government had an eminent domain power of its own.<sup>45</sup> Moreover, until the fifth amendment limitation on federal takings<sup>46</sup> was extended to the states under the due process clause of the fourteenth amendment in 1896, state takings were seldom reviewed in the federal forum.<sup>47</sup> The state law origins of eminent domain law resulted in considerable variety in the early legal rules. Nonetheless, by the early nineteenth century, the fundamental principles that form the framework of eminent domain law today had emerged.<sup>48</sup>

From the outset, the courts recognized that the government's ability to take private property was an inherent attribute of sovereignty.<sup>49</sup> The government's right to do so, however, was limited by

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<sup>45</sup> See *Kohl v. United States*, 91 U.S. 367, 368, 372 (1875) (holding that postal power includes power to obtain sites for post offices by eminent domain). See generally 1 NICHOLS, *supra* note 14, § 1.24 (discussing history and development of federal government's eminent domain power).

<sup>46</sup> "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

<sup>47</sup> See Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 207 (1978); Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599-600 & n.4 (1949).

<sup>48</sup> See generally Scheiber, *Property Law, Expropriation, and Resource Allocation by the Government, 1789-1910*, in AMERICAN LAW AND THE CONSTITUTIONAL ORDER (L. Friedman & H. Scheiber, eds. 1978); Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67 (1931); Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553 (1972).

<sup>49</sup> None of the early state constitutions explicitly granted the eminent domain power to the states. Even the fifth amendment to the federal constitution creates a restraint upon power that is nowhere granted to the federal government. See *supra* note 46. For a discussion of the adoption of this clause, see E.F. PAUL, *PROPERTY RIGHTS AND EMINENT DOMAIN* 73-77 (1987) and Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 695 (1985).

The condemnation power was well-known in English law at the time, however, and oft-used in the American colonies as well. See generally Stoebuck, *supra* note 48, at 554-66. Early proponents of the natural law theory, such as Grotius, Pufendorf, Vattel, Bynkershoek, and Montesquieu, articulated the notion of eminent domain as an inherent power. See generally E.F. PAUL, *supra*, at 74-77; Lenhoff, *Development of the Concept of Eminent Domain*, 42 COLUM. L. REV. 596, 596-601 (1942); Stoebuck, *supra* note 48, at 559-60. According to the United States Supreme Court's classic statement, the taking power is a "political necessity," because "[s]uch an authority is essential to [the sovereign's] independent existence and perpetuity." *Kohl v. United States*, 91 U.S. 367, 371 (1875).

the requirement that the taking be for a "public use" or "public purpose." Originally, courts interpreted this requirement narrowly and literally. A legitimate exercise of the eminent domain power required that the public have an actual right to use the property after it was taken.<sup>50</sup> The government used early exercises of the eminent domain power to foster improvements such as the development of roads and mills or the drainage of land,<sup>51</sup> few of which gave rise to serious concerns about a lack of public use.

As the nation developed and industry expanded, the eminent domain power became an increasingly popular tool for obtaining the land required to build transportation networks and commercial centers,<sup>52</sup> and the eminent domain power was increasingly delegated to private enterprises, such as railroad and coal companies.<sup>53</sup> In order to satisfy the perceived need for public improvements, the courts began to chip away at the narrow view of public use.<sup>54</sup> They redefined public use as a "public advantage" or "public benefit," and concluded that anything that promoted the growth of industry contributed to the general welfare of the community and so was a public use.<sup>55</sup>

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<sup>50</sup> 2A NICHOLS, *supra* note 14, § 7.02[1]; Comment, *supra* note 47, at 603. For example, the courts upheld mill acts that allowed mill owners to flood adjacent lands because the acts required the mills to be kept open to the public. See Scheiber, *The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts*, in 5 PERSPECTIVES IN AMERICAN HISTORY 329, 371-72 (D. Fleming & B. Bailyn eds. 1971).

<sup>51</sup> 1 NICHOLS, *supra* note 14, § 1.22; 2A *id.* § 7.01; Horwitz, *The Transformation in the Conception of Property in American Law, 1780-1860*, 40 U. CHI. L. REV. 248, 270-78 (1973); Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 ENVTL. L. 1, 13-15 (1980); Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L. REV. 615, 617 (1940).

<sup>52</sup> See Meidinger, *supra* note 51, at 23-41; Comment, *supra* note 47, at 601-02. Much of nineteenth century condemnation was carried out by private corporations, such as railroads, to foster transportation networks. See Freyer, *Reassessing the Impact of Eminent Domain in Early American Economic Development*, 1981 Wis. L. REV. 1263, 1263; Comment, *Incidental Losses*, *supra* note 1, at 65-66.

<sup>53</sup> See generally Bennett, *Eminent Domain and Redevelopment: The Return of Engine Charlie*, 31 DE PAUL L. REV. 115, 119-22 (1981). The expansion of the use of the eminent domain power during the Industrial Revolution resulted in a restricted definition of "public use." See Nichols, *supra* note 51, at 617-18. Nichols stated:

In the pre-industrial America, any fear that eminent domain might be abused was sufficiently met by the requirement that just compensation be paid. When great enterprises began to emerge, with masses of capital at their command, the fear that some legislature's conception of public advantage might lead it to authorize wholesale expropriation of farms and homes was not so academic.

*Id.* at 618.

<sup>54</sup> See 2A NICHOLS, *supra* note 14, § 7.02[2]; Horwitz, *supra* note 51, at 273.

<sup>55</sup> For example, in rejecting the "narrow view" of public use, the Idaho Supreme Court stated:

The transfer of private property from one individual to another under the eminent domain power became increasingly common throughout the nineteenth century as the country industrialized and developed.<sup>56</sup> The United States Supreme Court ultimately adopted this broader approach to public use as well.<sup>57</sup> The Court has repeatedly narrowed the scope of its authority to review a legislative decision that a taking is for a public use through its statements that such decisions are entitled to judicial deference.<sup>58</sup> The Supreme Court's recent pronouncement in *Hawaii Housing Authority v. Midkiff* that a taking must be upheld if it is "rationally related to a conceivable public purpose"<sup>59</sup> is commonly viewed as having driven the last nail into the coffin of the public use doctrine.<sup>60</sup> The prevailing wisdom now is that the "public use" limitation no longer serves as a substantial restriction on the government's power to take.<sup>61</sup>

The second important rule that evolved out of early condemnation cases was the requirement that a property owner receive "just" or "fair" compensation when his or her property was condemned. Because the government's right to take was accepted as a

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[I]t is enough if the taking tends to enlarge the resources, increase the industrial energies and promote the productive power of any considerable part of the inhabitants of a section of the state, or leads to the growth of towns and the creation of new channels for the employment of private capital and labor, as such results indirectly contribute to the general prosperity of the whole community.

*Potlatch Lumber Co. v. Peterson*, 12 Idaho 769, 785, 88 P. 426, 431 (1906). See also Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U.L. REV. 409, 413 (1983) (stating that during the nineteenth and early twentieth centuries, "public use" was generally equated with "public advantage").

<sup>56</sup> For example, the courts upheld grants of extensive eminent domain powers to railroad companies, even though the companies were constructing private lines, on the theory that the construction of transportation networks served the public interest. Bennett, *supra* note 53, at 119-20.

<sup>57</sup> See *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30, 32 (1916) (repudiating the "use by the public" test as applied to state takings); see also Comment, *supra* note 47, at 609.

<sup>58</sup> See, e.g., *Berman v. Parker*, 348 U.S. 26, 32 (1954) ("The role of the judiciary in determining whether [the eminent domain] power is being exercised for a public purpose is an extremely narrow one."); *United States v. Gettysburg Elec. Ry.*, 160 U.S. 668, 680 (1896) (a congressional "act is presumed to be valid unless its invalidity is plain and apparent").

<sup>59</sup> 467 U.S. 229, 241 (1984).

<sup>60</sup> See E.F. PAUL, *supra* note 49, at 99; Aladjem, *Public Use and Treatment as an Equal: An Essay on Poletown Neighborhood Council v. City of Detroit and Hawaii Housing Authority v. Midkiff*, 15 *ECOLOGY L.Q.* 671, 677-80 (1988).

<sup>61</sup> See Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 *SUP. CT. REV.* 63, 64-71 (of 89 Supreme Court cases on eminent domain law from 1932 to 1962, only five challenged the public use component).

given, and because the "public use" requirement was soon emasculated by perceived societal exigencies, the requirement of just compensation became the primary protection for the property owner's rights. The business losses issue arises under this rule. What compensation is due a business owner when the real property on which the business is located is taken?

Eighteenth-century colonial legislatures most often invoked the power of eminent domain by means of statutes authorizing the construction of public roads,<sup>62</sup> though the power was also delegated in some instances to private parties for the construction of private mills or roads or the drainage of lowlands.<sup>63</sup> In the early years, however, compensation was generally provided only for enclosed or improved land.<sup>64</sup> In an undeveloped, unindustrialized nation, unimproved land was not considered a valuable property right for which compensation had to be paid. After all, land was readily available and easily replaced, and improved access was likely to render the property owner's remaining land much more valuable.

The concept that just compensation was required whenever a taking for a public use occurred thus developed slowly in American law. Only three of the original states even addressed the ability of the government to take private land in their first constitutions;<sup>65</sup> none of them referred to the necessity for compensation. Rather,

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<sup>62</sup> See 1 NICHOLS, *supra* note 14, § 1.22 [1], at p. 1-78; Stoeck, *supra* note 48, at 579-83.

<sup>63</sup> See 1 NICHOLS, *supra* note 14, § 1.22 [7], [8], [13], [14].

<sup>64</sup> Note, *supra* note 49, at 695. Massachusetts did compensate landowners for unimproved land taken to build state roads. See *id.* at 695 n.5 (citing relevant acts). Massachusetts, however, seems to be the exception to the general rule that no compensation was given for unimproved land. See *id.* at 695 & n.6 (citing relevant cases and acts); see also Bender, *The Takings Clause: Principles or Politics*, 34 BUFFALO L. REV. 735, 752-53 (1985); Stoeck, *supra* note 48, at 582-83.

Only the colony of Virginia appears to have regularly taken improved land for roads without compensation. See Note, *supra* note 49, at 695 n.6 (citing relevant acts). Virginia did not provide such payment "until a very late period." *Stokes & Smith v. Upper Appomattox Co.*, 30 Va. (3 Leigh) 318, 337 (1831). For a description of colonial practices, see also M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860*, at 63-64 (1977); 1 NICHOLS, *supra* note 14, § 1.22; Stoeck, *supra* note 48, at 579-83.

<sup>65</sup> These states were Maryland, New York, and North Carolina. See MARYLAND CONST. of 1776, art. XVII, reprinted in 3 F. THORPE, *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1688* (1909); NEW YORK CONST. of 1777, art. XIII, reprinted in 5 F. THORPE, *supra*, at 2632; N.C. CONST. of 1776, art. XII, reprinted in 5 F. THORPE, *supra*, at 2788. Their takings clauses were based on the Magna Carta, which states: "No free man shall be . . . disseised . . . except by the lawful judgment of his peers or by the law of the land." MAGNA CARTA art. 39; see also Grant, *supra* note 48, at 69-70.

takings were authorized by the legislatures, and compensated only to the extent those bodies deemed necessary.<sup>66</sup> The courts, however, soon established that the government was required to pay for what it took, as a matter of "natural law."<sup>67</sup> Today, every state considers compensation a mandatory accompaniment to condemnation actions,<sup>68</sup> and the United States Supreme Court has read a compensation requirement into the due process clause of the fourteenth amendment.<sup>69</sup>

The goal of eminent domain law is to indemnify the condemnee for the property loss caused by the condemnation—to put the owner in the same position monetarily as he or she would have been in if the property had not been taken.<sup>70</sup> This objective is usually accom-

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<sup>66</sup> The Massachusetts Constitution of 1780 was the first ratified American constitution to contain a compensation clause. See MASS. CONST. of 1780, pt. I, art. X, reprinted in 3 F. THORPE, *supra* note 65, at 1891 ("[W]henever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor."). It was soon followed by the Northwest Ordinance of 1787, which provided that "should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same." NORTHWEST ORDINANCE OF 1787, art. II, reprinted in 2 F. THORPE, *supra* note 65, at 961. Several pre-1789 state constitutions had clauses providing that one could not be deprived of property without the consent of the law of the land. See Stoebeuck, *supra* note 48, at 568 n.57 (Maryland (constitution of 1776), New York (1777), North Carolina (1776), and New Hampshire (1784)). Five state constitutions, however, made no mention of the taking issue at all. See Stoebeuck, *supra* note 48, at 568 n.57 (Delaware (constitution of 1776), Georgia (1777), New Hampshire (1776), New Jersey (1776), and South Carolina (1776)). Although all but two of the states admitted into the Union later provided for compensation in their first constitutions, when the fourteenth amendment to the federal constitution was enacted, in 1868, five of the original states still had no constitutional provision regarding takings. See generally 1 NICHOLS, *supra* note 14, § 1.3.

The Vermont Constitution of 1777 was the first state constitution to require compensation for takings. See Note, *supra* note 49, at 702. It provided that "whenever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money." VT. CONST. of 1777, ch. I, art. II, reprinted in 6 F. THORPE, *supra* note 65, at 3740. See generally Note, *supra* note 49, at 702-04 (discussing Vermont's 1777 constitution). The 1777 Vermont constitution was passed by the legislature, but was never ratified by the people of Vermont, although the compensation clause was included in a later constitution, which was ratified in 1786. VT. CONST. of 1786, ch. I, art. II, reprinted in 6 F. THORPE, *supra* note 65, at 3752.

<sup>67</sup> See, e.g., *In re Mount Washington Rd. Co.*, 35 N.H. 134, 142 (1857); *Gardner v. Trustees of Newburgh*, 2 Johns. Ch. 162 (N.Y. Ch. 1816); 2A NICHOLS, *supra* note 14, § 7.01.

<sup>68</sup> This is true even in North Carolina, which has no eminent domain clause in its constitution, but which nonetheless applies the rules judicially. See *Gray v. City of High Point*, 203 N.C. 756, 765, 166 S.E. 911, 916 (1932); see also 1 NICHOLS, *supra* note 14, § 1.3.

<sup>69</sup> See *Griggs v. Allegheny County*, 369 U.S. 84, 90 (1962); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

<sup>70</sup> *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 473-74 (1973); *United States v. Reynolds*, 397 U.S. 14, 16 (1970) (footnote omitted) (the owner is to



plished by providing the owner with the fair market value of the property at the time of the taking,<sup>71</sup> which is typically measured by "what a willing buyer would pay in cash to a willing seller,"<sup>72</sup> taking into account the uses for which the land is suited.<sup>73</sup> However, the courts have focused upon compensating the property owner for the loss of *physical* property; although incidental losses are acknowledged as real losses that rational owners would factor into their sales prices, most courts find that these losses are noncompensable.<sup>74</sup> Goodwill and going-concern value are omitted from the fair market value calculation in most jurisdictions today. As a result, business owners do not receive true "just compensation" when the land on which their businesses are located is condemned.

receive the "full monetary equivalent of the property taken"); see *United States ex rel. T.V.A. v. Powelson*, 319 U.S. 266, 281-82 (1943).

<sup>71</sup> See, e.g., *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979); *Almota*, 409 U.S. at 473; *Reynolds*, 397 U.S. at 16-17; *United States v. Miller*, 317 U.S. 369, 374 (1943); *City of New York v. Sage*, 239 U.S. 57, 61 (1915); see also 1 L. ORGEL, *supra* note 40, §§ 11-17 (discussing fair market value as a measure of compensation); E.F. PAUL, *supra* note 49, at 85 (same). Although the fair market value standard seems to prevail in compensation cases, the Supreme Court has never held that it is the only constitutionally permissible standard. See *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950). In fact, the Court has deviated from that standard at times. See generally 4 NICHOLS, *supra* note 14, § 12.01; Francis, *Eminent Domain Compensation in Western States: A Critique of the Fair Market Value Model*, 1984 UTAH L. REV. 429, 430-39.

<sup>72</sup> *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 633 (1961) (quoting *Miller*, 317 U.S. at 374). Market value is intended to be an objective measure, "not the value to the owner for his particular purposes or to the condemnor for some special use." *United States v. Petty Motor Co.*, 327 U.S. 372, 377 (1946). Fair market value is generally shown through one of three methods: (1) market data about comparable sales, (2) capitalization of income, or (3) replacement cost, less depreciation. See generally 4 NICHOLS, *supra* note 14, § 12.02[1].

<sup>73</sup> See 4 NICHOLS, *supra* note 14, § 12.02[1].

<sup>74</sup> For example, in *United States v. General Motors Corp.*, the United States Supreme Court noted that if the owner were actually engaging in a free-market, uncoerced sale to someone other than the sovereign, the owner would consider losses such as "future loss of profits, the expense of moving removable fixtures and personal property from the premises, [and] the loss of good-will which inheres in the location of the land" in setting the price. 323 U.S. 373, 379 (1945). Although the Court recognized that "if the owner is to be made whole for the loss consequent on the sovereign's seizure of his property, these elements should properly be considered," it nonetheless characterized as "sound" the rule prohibiting such compensation when the sovereign takes the fee:

Even where state constitutions command that compensation be made for property "taken or damaged" for public use, as many do, it has generally been held that that which is taken or damaged is the group of rights which the so-called owner exercises in his dominion of the physical thing, and that damage to those rights of ownership does not include losses to his business or other consequential damage.

*Id.* at 379-80 (footnote omitted). Although the Court acknowledged that the consequences of such a rule are often "harsh," it believed that "whatever remedy may exist lies with Congress." *Id.* at 382.

The rule denying recovery of incidental losses stems from the restrictive definitions that the courts originally ascribed to the terms "property" and "taking." The perplexing question is why, when these terms have evolved over the last century to reflect more accurately the economic realities of property interests and government takings, does the business losses rule still persist?

### B. *The Historical Evolution of the Business Losses Rule*

The evolution of the rule denying compensation for business losses mirrors the economic development of the United States, and can best be understood within that historical framework. In pre-revolutionary America, the power of eminent domain was seldom needed. Very little land was improved or even privately owned, and "businesses" were scarce indeed. Thus, whenever condemnation was necessary, for the building of a road, for example, a literal "taking" of the land occurred; nonphysical injuries were few, and business losses rare.<sup>75</sup> Given such a simple economic environment, it is not surprising that the courts adopted a view of taking that was based upon the "physical" nature of property and that denied recovery of incidental or consequential damages for injury to intangible property. The rules that developed during these early years have persisted to the present, coloring still our notions of compensable injury, despite drastic changes in our economic landscape and a dramatic increase in the use of the eminent domain power by government entities.

#### 1. The Meaning of "Property"

The federal and most state constitutions address eminent domain in terms of private "property" being taken for public use. The few writings that existed at the time these constitutions were first drafted addressed the "taking" of "property" without ever defining what that "property" might be,<sup>76</sup> leaving open the question of whether the term included noncorporeal property interests, or only physical property. A few very early cases did allow compensation for loss of nonphysical property, such as the diversion of water from

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<sup>75</sup> See *Luber v. Milwaukee County*, 47 Wis. 2d 271, 279-80, 177 N.W.2d 380, 384-85 (1970); Comment, *supra* note 47, at 600.

<sup>76</sup> Stoebuck, *supra* note 48, at 599-600 & n.152.

land,<sup>77</sup> or the taking of a bridge franchise.<sup>78</sup> However, cases allowing compensation for noncorporeal property interests were the exception, rather than the rule. Generally, early takings involved the physical invasion of lands for projects such as roads and bridges.<sup>79</sup> As a result, the courts developed a narrow definition of "property" that included within its scope only land or other types of tangible property.<sup>80</sup>

As economic relationships grew more complex and urban land became more developed and more valuable throughout the nineteenth century,<sup>81</sup> courts began to expand their definition of property to include the various types of property interests already recognized in other areas of the law. The courts began to acknowledge that "property" does not refer to the mere physical res, but rather defines the entire bundle of rights associated with the res. The term "property" no longer included just the land itself, but encompassed all of the rights, powers, privileges, and communities that together form the ownership of land.<sup>82</sup> The transformation to this expanded

<sup>77</sup> *Gardner v. Trustees of Newburgh*, 2 Johns. Ch. 162 (N.Y. Ch. 1816).

<sup>78</sup> *Proprietors of Piscataqua Bridge v. Proprietors of New-Hampshire Bridge*, 7 N.H. 35, 69 (1834). The plaintiff in *Enfield Toll Bridge Co. v. Connecticut River Co.* also argued for compensation for the taking of an incorporeal property interest, but the court decided the case without reaching the issue. 7 Conn. 28, 38-40, 51 (1828).

<sup>79</sup> See *Stoebeuck*, *supra* note 48, at 600.

<sup>80</sup> See, e.g., *Callender v. Marsh*, 18 Mass. (1 Pick.) 418, 434 (1823); *Commissioners of Hmochitto River v. Withers*, 29 Miss. 21, 32 (1855) (property must be of a "specific, fixed, and tangible nature, capable of being had in possession and transmitted to another, as houses, lands, and chattels"), *aff'd sub nom.*, *Withers v. Buckley*, 61 U.S. 84 (1858); *Radcliff's Ex'rs v. Mayor of Brooklyn*, 4 N.Y. 195, 206 (1850). As expressed by Chief Justice Gibson of Pennsylvania:

A constitution is made, not particularly for the inspection of lawyers, but for the inspection of the million, that they may read and discern in it their rights and their duties; and it is consequently expressed in the terms that are most familiar to them. Words, therefore, which do not of themselves denote that they are used in a technical sense, are to have their plain, popular, obvious, and natural meaning . . . .

*Monongahela Navigation Co. v. Coons*, 6 Watts & Serg. 101, 114 (Pa. 1843). See also *Cormack, Legal Concepts in Cases of Eminent Domain*, 41 YALE L.J. 221, 229 (1931) (discussing how early state and federal courts thought of "property" in tangible terms); Note, *supra* note 49, at 708 (noting how James Madison, the author of the fifth amendment, intended that it apply only to physical takings).

<sup>81</sup> See *Liddick v. City of Council Bluffs*, 232 Iowa 197, 215, 5 N.W.2d 361, 371 (1942).

<sup>82</sup> See *Eaton v. Boston C. & M. R.R.*, 51 N.H. 504, 511 (1872). As the same court recognized in a water overflow case just two years later:

Property in land must be considered, for many purposes, not as an absolute, unrestricted dominion, but as an aggregation of qualified privileges, the limits of which are prescribed by the equality of rights, and the correlation of rights

conception of property occurred in fits and starts, rather than in a rapid revelation, however.<sup>83</sup>

In 1945, the United States Supreme Court, in *United States v. General Motors Corp.*,<sup>84</sup> recognized the dual meanings of "property," and resolved the definitional confusion. In discussing the scope and meaning of the word "property" as used in the takings clause of the federal Constitution, the Court rejected the notion that the term should be "used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law."<sup>85</sup> Rather, the Court found that the term is used "in a more

and obligations necessary for the highest enjoyment of land by the entire community of proprietors . . . . Property is taken when any one of those proprietary rights is taken, of which property consists.

*Thompson v. Androscoggin River Improvement Co.*, 54 N.H. 545, 551-52 (1874) (citation omitted). See also *Old Colony & Fall River R.R. v. Inhabitants of the County of Plymouth*, 80 Mass. (14 Gray) 155 (1859). The court noted:

The word "property" in the tenth article of the Bill of Rights, which provides that "whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor," should have such a liberal construction as to include every valuable interest which can be enjoyed as property and recognized as such.

*Old Colony*, 80 Mass. (14 Gray) at 161. See also *State ex rel. Smith v. Superior Court*, 26 Wash. 278, 286, 66 P. 385, 388 (1901) (Property "is used in the constitution in a comprehensive and unlimited sense, and so it must be construed . . . . It need not be any physical or tangible property which is subjected to a tangible invasion."); 1 J. LEWIS, *LAW OF EMINENT DOMAIN* § 63 (3d ed. 1909). Bentham identified four particular rights that together make up the concept of property:

(1) Right of occupation. (2) Right of excluding others. (3) Right of disposition; or the right of transferring the integral right to other persons. (4) Right of transmission, in virtue of which the integral right is often transmitted after the death of the proprietor, without any disposition on his part, to those in whose possession he would have wished to place it.

3 WORKS OF BENTHAM 182 (1843).

<sup>83</sup> Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 21-22 (1913); see also 2 NICHOLS, *supra* note 14, § 5.01[1] at pp. 5-5 to 5-9. Professor Hohfeld summarized the imprecise definition given to "property" in the late nineteenth and early twentieth centuries thus:

Both with lawyers and with laymen this term has no definite or stable connotation. Sometimes it is employed to indicate the physical object to which various legal rights, privileges, etc., relate; then again—with far greater discrimination and accuracy—the word is used to denote the legal interest (or aggregate of legal relations) appertaining to such physical object. Frequently there is a rapid and fallacious shift from the one meaning to the other. At times, also, the term is used in such a "blended" sense as to convey no definite meaning whatever.

Hohfeld, *supra*, at 21-22.

<sup>84</sup> See 323 U.S. 373, 377-78 (1945).

<sup>85</sup> *Id.* at 377.

accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it."<sup>86</sup> Although the *General Motors* Court recognized the non-physical nature of "property," the Court essentially defined the term in tautological terms in another case handed down the same year: "But not all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion."<sup>87</sup>

The progression toward a definition of "property" based more upon legal realities of ownership and less upon the physical nature of the land was not necessarily an orderly one. The progression nonetheless did occur, and fundamentally altered the underpinnings of eminent domain law. "Property" now refers not only to the physical res, but also to the bundle of rights that the owner possesses with respect to that physical res.<sup>88</sup> Property interests are now viewed as being flexible, as being able to expand and grow in response to changing societal norms,<sup>89</sup> and as including intangible economic interests and government entitlements.<sup>90</sup> Although the Supreme Court has failed to articulate a comprehensive definition of "property,"<sup>91</sup> it has recognized that compensation may be required for the taking of a number of intangible interests, such as aerial ease-

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<sup>86</sup> *Id.* at 378. As the Court went on to explain:

When the sovereign exercises the power of eminent domain it substitutes itself in relation to the physical thing in question in place of him who formerly bore the relation to that thing, which we denominate ownership. In other words, it deals with what lawyers term the individual's "interest" in the thing in question. That interest may comprise the group of rights for which the shorthand term is "a fee simple" or it may be the interest known as an "estate or tenancy for years," as in the present instance. The constitutional provision is addressed to every sort of interest the citizen may possess.

*Id.*

<sup>87</sup> *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945).

<sup>88</sup> See, e.g., Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 11-12 (1927) ("Anyone who frees himself from the crudest materialism readily recognizes that as a legal term property denotes not material things but certain rights."); Hohfeld, *supra* note 83, at 22-24. See generally Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691 (1938).

<sup>89</sup> See, e.g., *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) ("Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . ."). See generally Horwitz, *supra* note 51 *passim*; Powell, *The Relationship Between Property Rights and Civil Rights*, 15 HASTINGS L.J. 135, 139-40 (1963).

<sup>90</sup> See, e.g., Reich, *The New Property*, 73 YALE L.J. 733, 785-86 (1964).

<sup>91</sup> See Peterson, *supra* note 42, at 1308-16, 1344-51.

ments,<sup>92</sup> trade secrets,<sup>93</sup> liens,<sup>94</sup> and contracts.<sup>95</sup> Nonetheless, as discussed below, the courts generally have not extended this protection to business interests such as goodwill or going-concern value, despite their status as "property rights" in other areas of the law.

## 2. The Meaning of "Taking"

Originally, the courts applied a very rigid, narrow definition of "taking" as well. Both a physical invasion of land and an appropriation of the land by the government to the public use were required.<sup>96</sup> Many courts initially focused upon what the taker had gained, not what the owner had lost, and so held consequential and incidental losses noncompensable.<sup>97</sup> Although commentators were disturbed by the inequities inherent in denying recovery for these types of injuries,<sup>98</sup> the courts nonetheless found that such losses were compensable only through legislative grace, not through constitutional mandate.<sup>99</sup> Professor Sedgwick, writing in 1857, summarized the current state of the law thus:

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<sup>92</sup> See, e.g., *Griggs v. Allegheny County*, 369 U.S. 84, 89-90 (1962); *United States v. Causby*, 328 U.S. 256, 266-68 (1946).

<sup>93</sup> E.g., *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-04 (1984).

<sup>94</sup> See, e.g., *Armstrong v. United States*, 364 U.S. 40, 44, 46 (1960).

<sup>95</sup> E.g., *Lynch v. United States*, 292 U.S. 571, 579 (1934).

<sup>96</sup> As the Massachusetts Supreme Judicial Court stated: "It has ever been confined, in judicial application, to the case of property actually taken and appropriated by the government." *Callender v. Marsh*, 18 Mass. (1 Pick.) 418, 430 (1823).

<sup>97</sup> See, e.g., *Banner Milling Co. v. State*, 240 N.Y. 533, 542-43, 148 N.E. 668, 671, cert. denied, 269 U.S. 582 (1925); *Spies & McCoid*, *supra* note 1, at 442-43. Many of these early takings actually involved consequential losses, rather than incidental losses. For example, in *Callender*, the city had leveled a street adjoining plaintiff's house in such a way as to weaken the foundation, thus putting plaintiff to "great expense" in repairing the damage. 18 Mass. (1 Pick.) at 418. The Massachusetts Supreme Judicial Court held that the state constitution required compensation only in "the case of property actually taken and appropriated by the government." *Id.* at 430. Here, the government had taken nothing, even though the injuries it had inflicted were severe.

<sup>98</sup> Justice Story registered his doubt that the *Callender* rule was "easily maintainable," upon either "principle or authority." *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. (11 Pet.) 420, 638 (1837) (Story, J., dissenting). His concern was echoed by Chancellor Kent. See 2 J. KENT, COMMENTARIES ON AMERICAN LAW \*339 n.b. (1848) (citing, *inter alia*, *Gardner v. Trustees of Newburgh*, 2 Johns. Ch. 162 (N.Y. Ch. 1816)); see also A. SEDGWICK, STATUTORY AND CONSTITUTIONAL LAW 462-63 (2d. 1874) (arguing that an owner should be compensated for consequential damage that diminishes the value of real estate even though the property is not taken).

<sup>99</sup> For instance, the Pennsylvania Supreme Court ruled in 1840 that a consequential injury to property was "no taking at all." *In re "The Philadelphia & Trenton R.R."*, 6 Whart. 25, 46 (Pa. 1840). Although the state's usual practice was to compensate for consequential damages, it was done "of favour, not of right;" thus, "the citizen must depend on the forecast and justice of the legislature" in receiving compensation. *Id.* (footnote omitted). Although

It seems to be settled that, to entitle the owner to protection under [the takings] clause, the property must be actually taken in the physical sense of the word, and that the proprietor is not entitled to claim remuneration for indirect or consequential damage, no matter how serious or how clearly and unquestionably resulting from the exercise of the power of eminent domain.<sup>100</sup>

Sedgwick went on to criticize this rule, however, noting that if an indirect damage diminished the value of real estate, the owner was deprived of property even if no property was actually taken.<sup>101</sup> Yet the demand for economic progress and the concern that compen-

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the Pennsylvania Supreme Court acknowledged in a later case that individuals might be forced to contribute involuntarily private property to the public good, it dismissed the problem by blithely labeling such losses as "accidental, but unavoidable," and offering the cold comfort that such "plaintiffs have at least the miserable good luck to know that they have companions in misfortune: would that it were in our power to afford them more solid consolation!" *Monongahela Navigation Co. v. Coons*, 6 Watts & Serg. 101, 115 (Pa. 1843). If a remedy was to be found, it would have to be provided by the legislature, not the courts. As the *Coons* court stated:

It is not, therefore, enough to set before us a case of moral wrong, without showing us that we have legal power to redress it. Beyond constitutional restraint or legislative power, there is none but the legislative will, tempered by its sense of justice, which has happily been sufficient, in most cases, to protect the citizen.

*Id.* at 115.

<sup>100</sup> A. SEDGWICK, *STATUTORY AND CONSTITUTIONAL LAW* 519-20 (1857).

<sup>101</sup> According to Sedgwick:

To differ from the voice of so many learned and sagacious magistrates, may almost wear the aspect of presumption; but I cannot refrain from the expression of the opinion, that this limitation of the term *taking* to the actual physical appropriation of property or a divesting of the title is, it seems to me, far too narrow a construction to answer the purposes of justice, or to meet the demands of an equal administration of the great powers of government.

The tendency under our system is too often to sacrifice the individual to the community; and it seems very difficult in reason to show why the State should not pay for property of which it destroys or impairs the value, as well as for what it physically takes. If by reason of a consequential damage the value of real estate is positively diminished, it does not appear arduous to prove that in point of fact the owner is deprived of property, though a particular piece of property may not be actually taken. Objections of the same kind might be urged to our system of assessment for local improvements, by which, in too many cases, the only compensation for real estate actually taken, is in an hypothetical and imaginary benefit conferred. It may be true that if the benefit conferred by an improvement on adjacent proprietors were not taken into consideration, some inequality would result; but it seems more conformable to equity, and indeed to the language of the constitutional clause, that an individual advantage should be conferred in a few cases on a citizen, than that in many he should be a direct and certain loser, in consequence of public improvements.

*Id.* at 524-25 (emphasis in original). Sedgwick noted that "the matter can only be now remedied by the insertion of carefully drawn clauses in our legislative acts, which shall give to property the full protection that the constitutional guarantee has failed to secure." *Id.* at 525.

sation requirements would forestall development and hinder America's economic expansion fostered this narrow definition of "taking,"<sup>102</sup> which had substantial implications for the recovery of incidental losses. When presented with business losses cases, the courts theorized that only the land on which the business was located had been taken, not the business itself, and so no compensation was due.<sup>103</sup>

The broad definition of "property" that evolved in the late nineteenth and early twentieth centuries, however, necessitated a broad definition of "taking." If "property" constitutes more than mere physical res, then "taking" must refer to something more than mere acquisition of title or occupancy by the government.<sup>104</sup> And, indeed, the courts came to recognize that the term "taking" should not be construed too narrowly. As the number of uncompensated losses grew,<sup>105</sup> the courts began to change their stance,<sup>106</sup> spurred on by two separate legal developments:

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<sup>102</sup> See M. HORWITZ, *supra* note 64, at 66, 70-74; Cormack, *supra* note 80, at 226.

<sup>103</sup> See *infra* note 122 and accompanying text.

<sup>104</sup> This point was artfully made by the Pennsylvania Supreme Court in ruling that a liquor license was "property" that could be "taken:"

"[T]o take" means simply to acquire possession or custody when "property" is viewed from the physical object concept. When "property" is viewed from the standpoint of the mental or abstract concept, the meaning of "to take" is that expressed by Shakespeare, when, after the judgment of the court, the Merchant of Venice says:

"You take my house when you do take the prop That doth sustain by [sic] house; you take my life When you do take the means whereby I live."

The condemnee in this appeal expressed the same sentiments when testifying about his liquor license:

"The value of the liquor license represented to me the ability to do business there. Without it there was nothing there at all. So that the value of the liquor license became the amount of money I could get for the sale of the business less whatever equipment was worth."

*Redevelopment Auth. of Philadelphia v. Lieberman*, 461 Pa. 208, 214, 336 A.2d 249, 252-53 (1975) (quoting *The Merchant of Venice*, Act IV, Scene 1, line 375). See also 1 J. LEWIS, *supra* note 82, § 65. According to Lewis:

[I]t may be laid down as a general proposition, based upon the nature of property itself, that, whenever the lawful rights of an individual to the possession, use or enjoyment of his land are in any degree abridged or destroyed by reason of the exercise of the power of eminent domain, his property is, *pro tanto*, taken, and he is entitled to compensation.

*Id.* § 65, at 56 (footnote omitted).

<sup>105</sup> Many of these cases arose in the context of flooding and street access cases. See Cormack, *supra* note 80, at 226-31; Kratovil & Harrison, *supra* note 1, at 600; Lenhoff, *supra* note 49, at 605-08; Spies & McCoid, *supra* note 1, at 443.

<sup>106</sup> See, e.g., *Eaton v. Boston C. & M. R.R.*, 51 N.H. 504, 511 (1872). The New Hampshire Supreme Court noted:

To constitute a "taking of property," it seems to have sometimes been held necessary that there should be "an exclusive appropriation," "a total assumption



First, the United States Supreme Court began to expand its definition of "taking." In *Pumpelly v. Green Bay Co.*,<sup>107</sup> the Supreme Court held that a physical appropriation was not required to support a taking, but that a destruction of property also gave rise to a compensable taking, even though the government had not actually taken title to the land.<sup>108</sup> Although the Supreme Court ultimately limited the holding in *Pumpelly*,<sup>109</sup> the case did reduce the physical

of possession," "a complete ouster," an absolute or total conversion of the entire property, "a taking [of] the property altogether." These views seem to us to be founded on a misconception of the meaning of the term "property," as used in the various State constitutions.

*Id.*

<sup>107</sup> 80 U.S. (13 Wall.) 166 (1872). In this case, the Court interpreted Wisconsin's constitutional provision on eminent domain, which, like the fifth amendment, provided that "[t]he property of no person shall be taken for public use without just compensation therefor." *Id.* (quoting Wisconsin's constitution). The Green Bay Company, in constructing a dam authorized under a Wisconsin statute, flooded 640 acres of Pumpelly's land. *Id.* at 167. In defense to Pumpelly's action for trespass on the case, the company cited several cases that held that, because of the state's superior rights to regulate and improve navigation, landowners along navigable rivers could not recover consequential damages. *Id.* at 172-74. The Court, however, noted that although these cases were valid in their proper application, the cases had "gone to the uttermost limit of sound judicial construction . . . and, in some cases, beyond it." *Id.* at 181.

<sup>108</sup> *Id.* As the Court noted, it would produce a:

very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use.

*Id.* at 177-78 (emphasis in original). The Court went on to state:

Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.

*Id.* at 178.

<sup>109</sup> The Court limited the holding to cases "where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness." *Id.* at 181. In later cases, the Supreme Court further limited the scope of recovery by stating that there was no taking unless the overflow was "the direct result of the structure, and constitute[s] an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property." *Sanguinetti v. United States*, 264 U.S. 146, 149 (1924). Although the Supreme Court briefly flirted with this concept of consequential damages in the navigable waters area, see *United States v. Lynah*, 188 U.S. 445 (1903) (reaching the same result as *Pumpelly* on similar facts, but under the fifth amendment), it soon developed a complex mosaic of rules governing when consequential damages would or, more likely, would not be

connotations of the word "taking" that had predominated until this time. The transformation did not occur rapidly or evenly, however. For example, in 1925, in *Mitchell v. United States*,<sup>110</sup> the Supreme Court held that the federal government was not required to pay for plaintiff's business losses, even though it had condemned all of plaintiff's land, which was specially adapted to the growing of corn of a special grade and quality, and even though plaintiff was unable to relocate. The Court reasoned that any special value of the land had already been included in the compensation award, and that the going-concern value was not "taken" because the condemnor only needed, and only received, the physical property. In the eyes of the Court, "[i]f the business was destroyed, [it] was an unintended incident of the taking."<sup>111</sup>

Today, courts recognize that property has substantial intangible aspects, and the word "taking" is now descriptive—a "taking" involves a compensable property interest. Where there is such an interest, there is a taking. Where there is no such property interest, there can be no "taking," despite the costs to the owner. Thus, the existence of a "taking" will depend upon the definition given to "property."

A second development that emerged at the same time as *Pumpelly* had an equally important impact on the expansion of the recovery for losses by property owners. As the nation industrialized throughout the nineteenth century, state and local governments undertook increasing numbers of public projects in an effort to spur development of the requisite infrastructure. In the latter part of the nineteenth century, some states, recognizing the deleterious impact that these public improvement projects could have on private landowners, enacted constitutional amendments providing that private property should be neither taken *nor damaged* for public use

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allowed. See generally E.F. PAUL, *supra* note 49, at 84–89. For example, the Supreme Court held in several cases, some decided under state constitutions, see, e.g., *Meyer v. City of Richmond*, 172 U.S. 82, 95 (1898) (Virginia constitution); *Marchant v. Pennsylvania R.R.*, 153 U.S. 380, 384, 390 (1894) (Pennsylvania constitution), some under the federal constitution, see, e.g., *Gibson v. United States*, 166 U.S. 269, 275–76 (1897), that, in the absence of specific legislation, consequential damages did not constitute a taking. The Court distinguished *Pumpelly* on the grounds that it involved "a physical invasion of the real estate of the private owner, and a practical ouster of his possession." *Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1879). Where the damage complained of "was not the result of the taking of any part of [the] property . . . or a direct invasion thereof, but the incidental consequence of the lawful and proper exercise of a governmental power," the fifth amendment did not require compensation. *Gibson*, 166 U.S. at 275.

<sup>110</sup> 267 U.S. 341, 343, 346 (1925).

<sup>111</sup> *Id.* at 345.

without compensation.<sup>112</sup> Rapid urban expansion in Chicago sparked Illinois's adoption of the first such amendment in 1870,<sup>113</sup> and within the next decade, several states followed its lead.<sup>114</sup> The wisdom of such a provision was hotly debated;<sup>115</sup> nonetheless, today approximately one-half of the states have a similar provision.<sup>116</sup> Thus, in addition to compensation for land actually taken, recovery in eminent domain actions had been expanded to provide compensation where an injury was directly attributable to government action even though land had not actually been appropriated.<sup>117</sup> Yet

<sup>112</sup> 2A NICHOLS, *supra* note 14, § 6.26; see also 18 AM. JUR. *Eminent Domain* § 136 (1938) (discussing addition of "or damaged" clauses to state constitutions).

<sup>113</sup> 2A NICHOLS, *supra* note 14, § 6.26. The amendment was prompted by widespread dissatisfaction with denial of compensation to landowners damaged by changes in street grade. See *Rigney v. City of Chicago*, 102 Ill. 64, 72-74 (1881). For a review of the history and purpose of the Illinois provision, see *Chicago v. Taylor*, 125 U.S. 161, 164-65 (1888); *Reardon v. City & County of San Francisco*, 66 Cal. 492, 501-02, 6 P. 317, 322-23 (1885); *Blincoe v. Choctaw, O. & W. R.R.*, 16 Okla. 286, 293-94, 83 P. 903, 906 (1905).

<sup>114</sup> These states were: West Virginia (1872), Arkansas (1874), Pennsylvania (1874), Alabama (1875), Missouri (1875), Nebraska (1875), Colorado (1876), Texas (1876), Georgia (1877), California (1879), and Louisiana (1879). 2A NICHOLS, *supra* note 14, § 6.26.

<sup>115</sup> In deciding a case under the Illinois provision, the Supreme Court summarized the arguments against allowing such provisions in *Chicago v. Taylor*, 125 U.S. 161 (1888), as follows:

It may be [that such a provision], in regard to compensation to owners of private property "damaged" for the public use, has proved a serious obstacle to municipal improvements; that the sound policy of the old rule, that private property is held subject to any consequential damages that may arise from the erection on a public highway of a lawful structure, is being constantly vindicated; and that the constitutional provision in question is "a handicap" upon municipal improvement of public highways. And it may, also, be, as is suggested, doubtful whether a constitutional convention could now be convened that would again incorporate in the organic law the existing provision in regard to indirect or consequential damage to private property so far as the same is caused by public improvements. We dismiss these several suggestions with the single observation that they can be addressed more properly to the people of the State in support of a proposition to change their constitution.

*Id.* at 170.

<sup>116</sup> The states are Alabama, Arizona, Arkansas, California, Colorado, Georgia, Illinois, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, Pennsylvania, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming. See 2A NICHOLS, *supra* note 14, § 6.26.

<sup>117</sup> See, e.g., *Reardon*, 66 Cal. at 502-04, 6 P. at 323-24; *Chicago & W.I. R.R. v. Ayres*, 106 Ill. 511, 518 (1883); *Mississippi State Highway Comm'n v. Colonial Inn, Inc.*, 246 Miss. 422, 431-32, 149 So. 2d 851, 855 (1963); *Less v. City of Butte*, 28 Mont. 27, 31-32, 72 P. 140, 141 (1903); *City of Omaha v. Kramer*, 25 Neb. 489, 493, 41 N.W. 295, 296 (1889). According to NICHOLS:

Under this provision property is damaged when it is made less valuable, less useful, or less desirable, and it is immaterial whether such damage occurs by reason of the construction or the maintenance of the project, so long as it is directly attributable to such causative factor and irrespective of whether or not there has been an actual physical taking of any part of such property.

2A NICHOLS, *supra* note 14, § 6.31[2], at pp. 6-218 to 6-219 (footnotes omitted).

the courts were still concerned that public improvements would be discouraged by excessive damage awards, and they quickly established that recovery would be permitted only where the injury was significant, peculiar to the affected property, and different in kind than that suffered by the public as a whole.<sup>118</sup> Moreover, the courts also determined that "damaged" did not refer to injuries to business,<sup>119</sup> and so business losses continued to go uncompensated.

### III. THE THEORETICAL UNDERPINNINGS OF THE BUSINESS LOSSES RULE

Throughout the late nineteenth and early twentieth centuries, then, the legal concepts of "property" and "taking" expanded to provide greater protections for property owners. Yet this expansion of protected interests explicitly excluded protection of business interests such as going-concern value, goodwill, or profits. A variety of legal theories left business losses outside the broadening scope of constitutionally-mandated forms of recovery.

#### A. Theories for Denying Recovery of Business Losses

Courts that have denied recovery for business losses have espoused a number of reasons for doing so. It is difficult to categorize the vaguely-worded reasoning articulated by some courts. Indeed, many courts deny recovery for business losses without ever having clearly explained their reasons for doing so. The traditional rationale given is that a damage to a business is *damnum absque injuria*<sup>120</sup>—

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<sup>118</sup> See Kratovil & Harrison, *supra* note 1, at 611-12.

<sup>119</sup> See, e.g., *People v. Sayig*, 101 Cal. App. 2d 890, 902, 226 P.2d 702, 710 (1951); *Hohmann v. City of Chicago*, 140 Ill. 226, 230-31, 29 N.E. 671, 672 (1892); *Reymond v. State*, 217 So. 2d 488, 492 (La. Ct. App. 1968); *Gillespie v. City of South Omaha*, 79 Neb. 441, 445, 112 N.W. 582, 584 (1907); *Sheridan Drive-In Theatre, Inc. v. State*, 384 P.2d 597, 599 (Wyo. 1963); see also 2A NICHOLS, *supra* note 14, §§ 6.27 & n.2, 6.31 & n.20 (citing cases holding that "damaged" did not refer to injury to businesses).

<sup>120</sup> See, e.g., *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 482-85 (1973) (Rehnquist, J., dissenting); *United States v. General Motors Corp.*, 323 U.S. 373, 383 (1945); *Mitchell v. United States*, 267 U.S. 341, 345 (1925); *City of Oakland v. Pacific Coast Lumber & Mill Co.*, 171 Cal. 392, 398, 153 P. 705, 707 (1915); *Auraria Businessmen Against Confiscation, Inc. v. Denver Urban Renewal Auth.*, 183 Colo. 441, 445-47, 517 P.2d 845, 847-48 (1974); see also 4 NICHOLS, *supra* note 14, § 13.3. According to the California Supreme Court:

[T]hat doctrine [*damnum absque injuria*] means merely that a person may suffer damages and be without remedy because no legal right or right established by law and possessed by him has been invaded, or the person causing the damage owes no duty known to the law to refrain from doing the act causing the damage.

*Rose v. State*, 19 Cal. 2d 713, 729, 123 P.2d 505, 515 (1942).

a harm without an injury—and hence noncompensable. Many courts are content to limit their analysis to this singularly unenlightening phrase. Closer examination, however, reveals that denial of recovery is typically based on one of four underlying theories,<sup>121</sup> all of which are relics of earlier days when legal theory was less developed and less able to deal with injury to and valuation of noncorporeal interests.

First, some courts have held that business damages are not compensable because the condemnor has actually taken only the land, not the business.<sup>122</sup> These courts reason that the business can still be carried on elsewhere, and the goodwill or going-concern value transferred with it without loss of value.<sup>123</sup> Some of the courts that adopt this rationale theorize that title to all property is held subject to an implied condition that it must be surrendered whenever the public interest requires it, so any unavoidable loss suffered

<sup>121</sup> See generally 4 NICHOLS, *supra* note 14, § 13.3.

<sup>122</sup> See, e.g., *Mississippi State Highway Comm'n v. McCardle*, 243 Miss. 111, 119, 137 So. 2d 793, 796-97 (1962); *Ranlet v. Concord R.R.*, 62 N.H. 561, 564 (1883); *In re People v. Isaac G. Johnson & Co.*, 219 A.D. 285, 288-89, 219 N.Y.S. 741, 744-45 (N.Y. App. Div.), *aff'd without op.*, 245 N.Y. 627, 157 N.E. 885, *cert. denied*, 275 U.S. 571 (1927)); *Boynton v. State*, 28 Misc. 2d 12, 14-15, 215 N.Y.S.2d 953, 956 (N.Y. Ct. Cl. 1961); *State Airport Comm'n v. May*, 51 R.I. 110, 112, 152 A. 225, 225-26 (1930); *State v. Ouzounian*, 26 Utah 2d 442, 445, 491 P.2d 1093, 1095 (1971); see also 1 L. ORGEL, *supra* note 40, § 162, at 661 ("The fundamental reason for the exclusion of evidence of profits lies in the rule of substantive law that the condemnor takes only the real property, not the business located thereon.") (footnote omitted).

This theory reached its zenith in 1925, in *Mitchell v. United States*, 267 U.S. 341 (1925), discussed *supra* notes 110 & 111 and accompanying text. See also *United States ex rel. T.V.A. v. Powelson*, 319 U.S. 266, 282 (1943) ("the sovereign must pay only for what it takes, not for opportunities which the owner may lose"); 4 NICHOLS, *supra* note 14, §§ 13.3, 13.31 (discussing courts' treatment of business interests on land taken); *cf.* *Bothwell v. United States*, 254 U.S. 231 (1920). *Bothwell* and his partners owned a large tract of land on which they stored hay and kept cattle. The United States built a dam which flooded the land, destroyed the hay, and required the partners to sell the cattle "at prices below their fair value." *Bothwell*, 254 U.S. at 232. The Supreme Court, in a short, one and one-half page opinion, stated that "nothing could have been recovered for destruction of business or loss sustained through enforced sale of the cattle. There was no actual taking of these things by the United States, and consequently no basis for an implied promise to make compensation." *Id.* at 233.

<sup>123</sup> See *Kimball Laundry Co. v. United States*, 338 U.S. 1, 11-12 (1949); *City & County of Denver v. Hinsey*, 177 Colo. 178, 183, 493 P.2d 348, 351 (1972) ("[T]he business itself is not being condemned and the business can be relocated elsewhere."); *Gray Line Bus Co. v. Greater Bridgeport Transit Dist.*, 188 Conn. 417, 421, 449 A.2d 1036, 1039 (1982); *Improved Parcel of Land v. State*, 57 Del. 454, 457, 201 A.2d 453, 454 (1964); *City of Trenton v. Lenzner*, 16 N.J. 465, 477, 109 A.2d 409, 415 (1954), *cert. denied*, 348 U.S. 972 (1955); *Banner Milling Co. v. State*, 240 N.Y. 533, 540, 148 N.E. 668, 670, *cert. denied*, 269 U.S. 582 (1925); see also Note, *An Inquiry into the Nature of Goodwill*, 53 COLUM. L. REV. 660, 674 (1953).

incident to the surrender of that land is not compensable.<sup>124</sup> Other courts believe that goodwill or going-concern value cannot be damaged, even though the business has been dislocated.<sup>125</sup> In the simple view of these courts, only the physical assets have been taken, and the owner of the business can simply relocate, taking his or her goodwill or going-concern value to the new location.<sup>126</sup> They emphasize that no compensation is due for any special value of the property to the owner, thus implying that goodwill and going-concern value are not transferable, but are of value only to the owner<sup>127</sup> and ignoring the fact that such business interests are routinely bought and sold in the marketplace. These courts typically deny recovery even if the business owner can clearly show that the business cannot be reestablished elsewhere.<sup>128</sup>

A second theory holds that business losses are noncompensable because of their speculative nature. This theory also takes two separate forms. Some courts believe that the injury itself is speculative—that there is only a “remote possibility that the owner will be unable to find a wholly suitable location for the transfer of going-concern value.”<sup>129</sup> Likewise, these courts consider profits as being dependent more upon the owner’s efforts than the land itself, and thus they regard the loss of profits resulting from a taking as being speculative.<sup>130</sup> These courts firmly believe that the great majority of

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<sup>124</sup> *E.g.*, *Ranlet v. Concord R.R.*, 62 N.H. 561, 564 (1883); *see also* 4 NICHOLS, *supra* note 14, § 13.32[1] & nn. 1 & 2, at p. 13–228. This argument, of course, ignores the constitutional mandate that just compensation be given for a taking.

<sup>125</sup> This is, in fact, precisely the rationale espoused by the United States Supreme Court in *Kimball Laundry*, 338 U.S. at 11–12. *See infra* notes 148–72 and accompanying text.

<sup>126</sup> *See, e.g.*, *Kimball Laundry*, 338 U.S. at 12 (“In the usual case most of it can be transferred . . .”); *Banner Milling*, 240 N.Y. at 540, 148 N.E. at 670 (“The owner of the business may remove to another place, establish his business and carry his good will with him.”). In *In re Edward J. Jeffries Homes Housing Project*, the Michigan Supreme Court stated: “A good plumber should be able to continue his business in almost any location and do as well as he formerly did in a neighborhood where in many homes there was a lack of adequate plumbing facilities.” 306 Mich. 638, 651, 11 N.W.2d 272, 276 (1943). Michigan law has since recognized some claims for business losses. *See infra* notes 312–47 and accompanying text.

<sup>127</sup> *See, e.g.*, *United States v. Petty Motor Co.*, 327 U.S. 372, 377–78 (1946) (“Since ‘market value’ does not fluctuate with the needs of condemnor or condemnee but with general demand for the property, evidence of loss of profits, damage to good will, the expense of relocation and other such consequential losses are refused in federal condemnation proceedings.”) (citations omitted); *see also Kimball Laundry*, 338 U.S. at 12 (citations omitted); 1 L. ORGEL, *supra* note 40, § 75, *Aloi & Goldberg, supra* note 1, at 634 (citing 2 J. LEWIS, *supra* note 82, § 706; 1 L. ORGEL, *supra* note 40, § 75).

<sup>128</sup> *See, e.g.*, *Amoskeag-Lawrence Mills, Inc. v. State*, 101 N.H. 392, 399, 144 A.2d 221, 226 (1958) (citing *United States ex rel. T.V.A. v. Powelson*, 319 U.S. 266, 283 (1943)).

<sup>129</sup> *See, e.g.*, *Kimball Laundry*, 338 U.S. at 15.

<sup>130</sup> *See, e.g.*, 4 NICHOLS, *supra* note 14, § 13.3[2]; 1 L. ORGEL, *supra* note 40, § 162.

diligent business owners will be able to relocate with little or no loss of value.<sup>131</sup>

The second variant of this theory postulates that business losses, though admittedly likely to occur, are so difficult to value and so speculative and uncertain in amount that the court cannot award recovery for them.<sup>132</sup> This argument frequently arises in the context of compensation for loss of goodwill or loss of profits. Some courts adopting this theory find that the components that together create goodwill or profits, such as consumer demand and supplies of labor and raw materials, are too difficult to value individually, and therefore cannot be valued in the aggregate.<sup>133</sup> In cases denying recovery

<sup>131</sup> Statistics suggest that this assumption is false. A study conducted in the early 1960s revealed that 35.3% of displaced businesses discontinued their operations, largely because of "[t]he inability of many small (one or two person) tenant businesses to transfer their 'good will' to a relocation site . . . ." U.S. ADVISORY COMM'N ON INTERGOV'TAL RELATIONS, RELOCATION: UNEQUAL TREATMENT OF PEOPLE AND BUSINESSES DISPLACED BY GOVERNMENTS 54 (1965). A congressional study of the effects of urban condemnation in Washington, D.C. during the same time period revealed that 83 of 211 businesses in one project site were permanently discontinued after condemnation. Of the remaining businesses, 53 suffered large losses of income, usually 25% or more of former net income. Not surprisingly, small businesses suffered the most: 60% of them discontinued operations permanently, and many of them suffered disproportionately greater out-of-pocket losses. Small businesses that rented their premises rather than owning them experienced the greatest losses. STAFF OF HOUSE COMM. ON PUBLIC WORKS, 88TH CONG., 2D SESS., STUDY OF COMPENSATION & ASSISTANCE FOR PERSONS AFFECTED BY REAL PROPERTY ACQUISITIONS IN FEDERALLY SUBSIDIZED PROGRAMS 473-85 (Comm. Print. 1964).

<sup>132</sup> See, e.g., *Powelson*, 319 U.S. at 285; *Jacksonville & S.E. Ry. v. Walsh*, 106 Ill. 253, 255-56 (1883); *State v. Heslar*, 257 Ind. 307, 314-15, 274 N.E.2d 261, 266 (1971); *Ryan v. Davis*, 201 Va. 79, 82, 109 S.E.2d 409, 413 (1959). The New York Court of Appeals stated: While it may be as in this case that removal from one place to another may cause some loss, yet the elements making up that loss are so highly speculative that the courts have not considered it an appropriation or damage for which the State should pay as commanded by the Constitution.

*Banner Milling Co. v. State*, 240 N.Y. 533, 540, 148 N.E. 668, 670, *cert. denied*, 269 U.S. 582 (1925). See also 4 NICHOLS, *supra* note 14, § 13.3[2]; Note, *The Unsoundness of California's Non-compensability Rule as Applied to Business Losses in Condemnation Cases*, 20 HASTINGS L. J. 675, 681-85 (1969); Comment, *Incidental Losses*, *supra* note 1, at 71.

<sup>133</sup> See, e.g., *A.G. Davis Ice Co. v. United States*, 362 F.2d 934, 936-37 (1st Cir. 1966); *Stockton & C. R.R. v. Galgiani*, 49 Cal. 139, 140 (1874); *Pause v. City of Atlanta*, 98 Ga. 92, 105, 26 S.E. 489, 493 (1895); *Braun v. Metropolitan W.S. Elevated R.R.*, 166 Ill. 434, 440, 46 N.E. 974, 976 (1897); *Johnson County Broadcasting Corp. v. Iowa State Highway Comm'n*, 258 Iowa 897, 904, 140 N.W.2d 714, 718 (1966); *City of St. Louis v. Union Quarry & Constr. Co.*, 394 S.W.2d 300, 306 (Mo. 1965); *Verzani v. State Dep't of Rds.*, 188 Neb. 162, 164-65, 195 N.W.2d 762, 765 (1972); *Ranlet v. Concord R.R.*, 62 N.H. 561, 564 (1883); *State ex rel. State Highway Comm'r v. Gallant*, 42 N.J. 583, 587, 202 A.2d 401, 403 (1964); *Boynton v. State*, 28 Misc. 2d 12, 14, 215 N.Y.S.2d 953, 956 (N.Y. Ct. Cl. 1961); *City of Tacoma v. Nisqually Power Co.*, 57 Wash. 420, 434, 107 P. 199, 204 (1910); *cf. City & County of Denver v. Hinsey*, 177 Colo. 178, 183, 493 P.2d 348, 351 (1972) ("Financial success in business is also too ephemeral and is tied to considerations involving the type of business which is being

of loss of profits, other courts state that because income is dependent upon the skill of the business owner or operator, it is too speculative to make the loss capable of reasonable ascertainment,<sup>134</sup> or that proof of loss of future profits or future business "is too remote, uncertain, and speculative to be allowed."<sup>135</sup> Awarding recovery for such uncertain damages could create a chink in the elaborate armor that courts have erected around the exercise of the eminent domain power, raising the possibility of excessive and unwarranted recovery in the future.<sup>136</sup>

Commentators have routinely and roundly lambasted this rationale, noting that courts have little difficulty in valuing goodwill in litigation between private parties or for tax purposes.<sup>137</sup> Moreover, because courts regularly value such ephemeral damages as pain and suffering or emotional distress, it is difficult to understand why they cannot value goodwill,<sup>138</sup> particularly given the recent developments in comprehensive accounting guidelines for doing so.<sup>139</sup> Nonetheless, courts still employ this theory as a reason for denying recovery.

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conducted, management, and a variety of other factors which are not tied to the land."); 1 L. ORGEL, *supra* note 40, § 162, at 662 ("[T]he courts have generally stated that business profits are the result of so many factors and that their repercussion on the market value of the real estate is so remote, that the evidence is more likely to mislead than to aid in the determination of market value.") (footnote omitted).

<sup>134</sup> *A.G. Davis Ice Co.*, 362 F.2d at 937; *Commonwealth v. Eubank*, 369 S.W.2d 15, 17 (Ky. 1963); *Sowers v. Schaeffer*, 155 Ohio St. 454, 459, 99 N.E.2d 313, 317 (1951); *cf.* *Norman's Kill Farm Dairy Co. v. State*, 53 Misc. 2d 578, 582, 279 N.Y.S.2d 292, 297 (N.Y. Ct. Cl. 1967) (stating that the factors of skilled management and goodwill were not affected by the appropriation of claimant's property).

<sup>135</sup> *Cincinnati Iron Store Co. v. Trustees, Cincinnati S. Ry.*, 9 Ohio C.C. Dec. 103, 104 (1906); *see also In re Appropriation of Easements for Highway Purposes*, 174 Ohio St. 441, 447, 190 N.E.2d 446, 450-51 (1963); *City of Renton v. Scott Pac. Terminal, Inc.*, 9 Wash. App. 364, 369, 512 P.2d 1137, 1141 (1973); *Gauley & E. Ry. v. Conley*, 84 W. Va. 489, 493, 100 S.E. 290, 292 (1919).

<sup>136</sup> *See, e.g., United States v. General Motors Corp.*, 323 U.S. 373, 385 (1945) (Douglas, J., concurring in part) ("promises swollen verdicts"); *Housing Auth. v. Green*, 200 La. 463, 474, 8 So. 2d 295, 299 (1942); *Sawyer v. Commonwealth*, 182 Mass. 245, 247, 65 N.E.2d 52, 53 (1902); *Natick Gas Light Co. v. Natick*, 175 Mass. 246, 252, 56 N.E. 292, 294 (1900); *In re Slum Clearance*, 332 Mich. 485, 496, 52 N.W.2d 195, 200 (1952); *Banner Milling Co. v. State*, 240 N.Y. 533, 540, 148 N.E. 668, 670, *cert. denied*, 269 U.S. 582 (1925); *Cleveland Boat Serv., Inc. v. City of Cleveland*, 165 Ohio St. 429, 430, 136 N.E.2d 274, 275 (1956).

<sup>137</sup> *See, e.g., Aloï & Goldberg, supra* note 1, at 628-29; *Kanner, supra* note 1, at 67-68; *Comment, Incidental Losses, supra* note 1, at 71. For a discussion of the recovery of lost profits in tort and contract litigation, *see generally* R. DUNN, *RECOVERY OF DAMAGES FOR LOST PROFITS* (3d ed. 1987 & Supp. 1990); 16 *PROOF OF FACTS 2D, Forensic Economics—Valuation of Business and Business Losses* (1978 & Supp. 1990).

<sup>138</sup> *See Kanner, supra* note 1, at 72.

<sup>139</sup> *See generally* D. KIESO & J. WEYGANDT, *INTERMEDIATE ACCOUNTING* 544-53 (6th ed. 1989); *Blaine, supra* note 21; *Paulsen, supra* note 21; *Schnee & Cargile, supra* note 27.



The third theory argues that "a business is less tangible in nature and more uncertain in its vicissitudes than the rights which the Constitution undertakes absolutely to protect."<sup>140</sup> This theory originally arose out of the notion that the rights of the property owner did not inhere in intangible interests, such as goodwill or going-concern value. In a sense, courts relying upon this theory view the entire business, as opposed to merely the business losses, as speculative and uncertain in value. To them, goodwill and going-concern value are not "property" in the "constitutional sense,"<sup>141</sup> i.e., the property interests to which incidental losses pertain are not property rights vis-a-vis the government.<sup>142</sup> Some of these courts acknowledge that these types of losses do occur and can inflict severe hardships on the owners, but nonetheless find the losses to be noncompensable.<sup>143</sup> These courts draw a distinction between the relationship between the individual property owner and the government and the relationship among private individuals;<sup>144</sup> conse-

<sup>140</sup> *Sawyer*, 182 Mass. at 247, 65 N.E. at 53; see also *Community Redev. Agency v. Abrams*, 15 Cal. 3d 813, 819-20, 543 P.2d 905, 909-10, 126 Cal. Rptr. 473, 477-78 (1975) (quoting 4 NICHOLS, *supra* note 14, § 13.3), *cert. denied*, 429 U.S. 869 (1976); 27 AM. JUR. 2D *Eminent Domain* § 285 (1962) ("The diminution of [a business's] value is a vaguer injury than the taking or appropriation with which the Constitution ordinarily deals.").

<sup>141</sup> As one court phrased it, "[a] business is not 'property' in the constitutional sense; and the value of a business is not material to the issue of just compensation, except insofar as it may tend to establish the market value of the real property." *State ex rel. Secretary of Dep't of Highways & Transp. v. Davis Concrete of Delaware, Inc.*, 355 A.2d 883, 886 (Del. 1976); see also *Backus v. Fort St. Union Depot Co.*, 169 U.S. 557, 574-75 (1898); *Sullivan v. Associated Billposters & Distrib.*, 6 F.2d 1000, 1011 (2d Cir. 1925); *Jamesson v. Downtown Dev. Auth.*, 322 So. 2d 510, 511 (Fla. 1975) (citing *Backus*); *Banner Milling Co. v. State*, 240 N.Y. 533, 542, 148 N.E. 668, 671, *cert. denied*, 269 U.S. 582 (1925); *cf. State ex rel. LaPrade v. Carrow*, 57 Ariz. 429, 433, 114 P.2d 891, 893 (1941) ("[I]njury to a business is not property, within the meaning of the statutes relating to eminent domain, unless there is some express statutory provision allowing it . . ."); *Williams v. State Highway Comm'n*, 252 N.C. 141, 146, 113 S.E.2d 263, 267 (1960); 4 NICHOLS, *supra* note 14, § 13.3 n.1, at pp. 13-180 to 13-181; *cf. Kayo Oil Co. v. State*, 340 So. 2d 756, 759 (Ala. 1976) ("Business profits are so remote from the market value of the land on which the business is located, that they are not proper indicia of the value of the land.").

<sup>142</sup> *Kratovil & Harrison*, *supra* note 1, at 603-04. As noted by this pair of commentators, "[a]n individual's economic claim that is given legal protection in conflicts with other individuals is a property right as against them, but the same economic claim may not be entitled to protection against the government, and as against the government it may not be a property right at all." *Id.* at 603 (citing, *inter alia*, *United States v. Willow River Power Co.*, 324 U.S. 499, 502-03, 510 (1945)); see also 1 L. ORGEL, *supra* note 40, § 2, at p. 11-112.

<sup>143</sup> See, e.g., *Sawyer*, 182 Mass. at 247, 65 N.E. at 53 ("There are many serious pecuniary injuries which may be inflicted without compensation . . . . No doubt a business may be property in a broad sense of the word, and property of great value . . . . But a business is less tangible in nature and more uncertain in its vicissitudes than the rights which the Constitution undertakes absolutely to protect.").

<sup>144</sup> See, e.g., *Willow River Power*, 324 U.S. at 509-10; *City of Newark v. Cook*, 99 N.J.

quently, they find that although losses in the latter instance may be compensable, losses in the first instance are not.<sup>145</sup>

The fourth theory states that such losses are not within the contemplation of the eminent domain clause of the constitution, whether state or federal. The federal constitution, according to this view, does not require compensation for the taking of purely personal property, because such property can be moved from the condemned site and used elsewhere by the owner.<sup>146</sup> According to this argument, if no compensation is due for *tangible* personal property, then surely no compensation is due for losses to *intangible* property incidental to a relocation of a business.<sup>147</sup>

### B. *Exceptions to the Business Losses Rule*

Clearly, the denial of recovery for business losses can work grave injuries on business owners. To ameliorate these injuries, the courts have formulated two major exceptions to the rule that business losses are not compensable: cases involving temporary takings and cases involving businesses taken to be operated as such under public control. The Supreme Court created the former and de-

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Eq. 527, 536-38, 133 A. 875, 879 (1926), *cert. denied*, 274 U.S. 757, *aff'd sub nom.* City of Newark v. Cook, 100 N.J. Eq. 584, 135 A. 916 (1927).

<sup>145</sup> For example, the California legislature and Supreme Court acknowledged that goodwill is recognized as a property interest under California statutory law. See CAL. CIV. CODE § 655 (West 1982) ("[t]here may be ownership of all inanimate things which are capable of appropriation or of manual delivery[.] . . . the good-will of a business"); CAL. BUS. & PROF. CODE § 14102 (West 1987) ("The good will of a business is property and is transferable."); see also *In re Marriage of Foster*, 42 Cal. App. 3d 577, 584-85, 117 Cal. Rptr. 49, 53-54 (1974) (marital law); *Lyon v. Lyon*, 246 Cal. App. 2d 519, 527-28, 54 Cal. Rptr. 829, 833-34 (1966) (contract); *Carrey v. Boyes Hot Springs Resort, Inc.*, 245 Cal. App. 2d 618, 622-23, 54 Cal. Rptr. 199, 202 (1966) (allowing damages for loss of goodwill in private tort action). Nonetheless, the California Supreme Court stated that goodwill "is not the form of property to which constitutional provisions requiring just compensation refer." *Community Redev. Agency v. Abrams*, 15 Cal. 3d 813, 819, 543 P.2d 905, 909, 126 Cal. Rptr. 473, 477 (1975), *cert. denied*, 429 U.S. 869 (1976).

<sup>146</sup> See *Becker v. Philadelphia & R.T. R.R.*, 177 Pa. 252, 258, 35 A. 617, 620 (1896). But see 4 NICHOLS, *supra* note 14, § 13.3 n.17 (quoting Kanner, *Business Damages in Eminent Domain*, ALI/ABA Eminent Domain Study Course 369, 369 (1978)). Kanner noted:

[T]he notion that "property" means real property is linguistically as well as logically and historically fallacious; there is ample historical evidence that the draftsmen of the Fifth Amendment's just compensation clause were overtly concerned with protecting personal property from uncompensated governmental seizure (i.e., they were concerned about such things as taking of horses, fodder and provisions for the army).

*Id.*

<sup>147</sup> See *Gauley & E. Ry. v. Conley*, 84 W. Va. 489, 494, 100 S.E. 290, 292 (1919).

scribed the latter in *Kimball Laundry Co. v. United States*<sup>148</sup> and, ironically, in so doing, gave one of the clearest explications to date of the general rule denying recovery for business losses.

In *Kimball*, the Laundry, a family-owned business, had operated for many years and had a large, modern plant. During World War II, the United States government temporarily condemned the plant on a year-to-year basis for use by the Army. It ultimately held the plant from November 1942 to March 1946. The Army retained most of the Laundry's employees to run the plant, and one of the owners remained as operating manager. Without the use of its facility, the Laundry was unable to serve its own customers, and was forced to suspend its business while the Army was in possession. The Laundry contended that it was entitled to compensation for destruction of the Laundry's "trade routes,"<sup>149</sup> because that destruction had diminished the value of its business. The trial and appeals courts rejected this claim, the latter noting: "The Government did not take or intend to take, and obviously could not use, the Company's business, trade routes or customers."<sup>150</sup>

The Supreme Court began its analysis by examining the definition of "going-concern value." Because the Laundry had already been compensated for the loss of its physical property, "any separate value that its trade routes may have must therefore result from the contribution to the earning capacity of the business of greater skill in management and more effective solicitation of patronage than are commonly given to such a combination of land, plant, and equipment."<sup>151</sup> The intangible nature of going-concern value alone was not sufficient grounds for denying compensation. As Justice Frankfurter explained, intangible property, like tangible property, is capable of being "taken" and, if so taken, should be compensable.<sup>152</sup> Having thus determined that going-concern value can be a

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<sup>148</sup> 338 U.S. 1 (1949).

<sup>149</sup> These trade routes consisted of "the lists of customers built up by solicitation over the years and for the continued hold of the Laundry on their patronage." *Id.* at 8.

<sup>150</sup> *Kimball Laundry Co. v. United States*, 166 F.2d 856, 860 (8th Cir. 1948), *rev'd*, 338 U.S. 1 (1949).

<sup>151</sup> 338 U.S. at 9.

<sup>152</sup> *Id.* at 11. The Supreme Court cited three cases in support of its contention that going-concern value is a compensable property right, each of which involved the computation of a fair rate of return on a public utility or service. *See McCardle v. Indianapolis Water Co.*, 272 U.S. 400, 415 (1926) (going-concern value is a property right and must be considered in determining rate water company may charge); *Galveston Elec. Co. v. City of Galveston*, 258 U.S. 388, 396-97 (1922) (although going-concern value must sometimes be compensated for if taken, it does not affect computation of fair rate of return for street car company);

compensable property right, the Court went on to discuss the circumstances under which compensation is required.

The *Kimball* Court first considered the case in which the fee title to business property has been taken. In such an instance, the going-concern value has not been taken; only the physical property is condemned, and the owner is free to relocate his or her business.<sup>153</sup> The Court conceded that the owner might suffer losses because of the difficulty of finding a suitable new location, and that such losses are noncompensable.<sup>154</sup> The Court believed, however, that a buyer of the business would not pay for the dissipation of goodwill caused by removal, "except perhaps to the extent that the prospect of its loss would induce the owner to hold out for a higher price for his land and building."<sup>155</sup> Thus, the Court reasoned:

When a condemnor has taken fee title to business property, there is reason for saying that the compensation due should not vary with the owner's good fortune or lack of it in finding premises suitable for the transference of going-concern value. In the usual case most of it can be transferred; in the remainder the amount of loss is so speculative that proof of it may justifiably be excluded.<sup>156</sup>

Furthermore, the Court noted, the same result occurs even when it is known that no other premises are available.<sup>157</sup>

The *Kimball* Court then discussed the situation in which the government has taken a business enterprise for continued operation.<sup>158</sup> The Supreme Court had first addressed this issue in 1892, in *Monongahela Navigation Co. v. United States*.<sup>159</sup> In *Monongahela*, a company had been granted a state charter to construct and operate locks on the Monongahela River. The federal government took the locks and continued to operate them as an ongoing operation, but the legislation authorizing the taking explicitly stated that the company was to receive no compensation for the loss of its franchise to

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Des Moines Gas Co. v. City of Des Moines, 238 U.S. 153, 165 (1915) (going-concern value is a property right and should be taken into account in determining value of property on which gas company has a right to make a fair return).

<sup>153</sup> 338 U.S. at 11; see also *supra* note 123 and accompanying text for a discussion of the theory that goodwill and going-concern value can be transferred without a loss in value.

<sup>154</sup> 338 U.S. at 11-12 (citing *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 676 (1923)).

<sup>155</sup> *Id.* at 12 (citation omitted).

<sup>156</sup> *Id.* (citation omitted).

<sup>157</sup> *Id.* (citing *Mitchell v. United States*, 267 U.S. 341, 343, 346 (1925)).

<sup>158</sup> *Id.* at 12-13.

<sup>159</sup> 148 U.S. 312 (1893).

collect tolls.<sup>160</sup> The Supreme Court held that the fifth amendment required that the owner be provided with the "full and perfect equivalent" of appropriated private property.<sup>161</sup> The *Monongahela* Court emphasized that under these facts, the owner was entitled to recover compensation for the loss of its franchise to collect tolls, because that franchise was an integral part of the property's value to the owner.<sup>162</sup>

By the time the *Kimball* Court addressed this issue, a half century later, it could examine a number of precedents, particularly in the public utility area.<sup>163</sup> The *Kimball* Court emphasized that because of the monopolistic nature of public utilities, the going-concern value is necessarily lost when the business is taken.<sup>164</sup> The condemnor has taken over the control and operation of the business, which includes not only the physical assets of the business, but the goodwill or going-concern value as well.<sup>165</sup> The fiction that the condemnee is able to take its goodwill or going-concern value and relocate elsewhere cannot be maintained under these circumstances.<sup>166</sup> Thus, when a business itself is taken by the public to be operated under public control, the business owner may recover for loss of goodwill or going-concern value of the business.<sup>167</sup>

The Laundry's circumstances, the Court decided, more closely resembled the public utility cases than the cases where a fee interest

<sup>160</sup> *Id.* at 313.

<sup>161</sup> *Id.* at 326.

<sup>162</sup> *Id.* at 329.

<sup>163</sup> 338 U.S. at 12 (citing *City of Omaha v. Omaha Water Co.*, 218 U.S. 180 (1910); *City & County of Denver v. Denver Union Water Co.*, 246 U.S. 178, 191 (1918)).

<sup>164</sup> *Id.* at 12-13.

<sup>165</sup> *Id.* at 13 ("The owner retains nothing of the going-concern value that it formerly possessed; so far as control of that value is concerned, the taker fully occupies the owner's shoes."); see also 4 NICHOLS, *supra* note 14, § 13.31, at p. 13-221.

<sup>166</sup> As noted by the New York Court of Appeals, "[t]here is a marked distinction between the instances where the State appropriates a public service corporation and all its business and good will as a going concern intending to continue its operations as a public enterprise, and those instances where the State desires the land and not the business." *Banner Milling Co. v. State*, 240 N.Y. 533, 539-40, 148 N.E. 668, 670 (citations omitted), *cert. denied*, 269 U.S. 582 (1925); see also *Denver Union Water Co.*, 246 U.S. at 191-92; *Omaha Water Co.*, 218 U.S. at 202-03; *In re Park Street (Lido Blvd.)*, Town of Hempstead, 71 Misc. 2d 554, 561-62, 564, 336 N.Y.S.2d 566, 574-75, 576-77 (N.Y. Sup. Ct. 1972), *rev'd*, 43 A.D.2d 45, 349 N.Y.S.2d 422 (N.Y. App. Div. 1973), *aff'd sub. nom.*, *Colony Beach Club, Inc. v. County of Nassau*, 39 N.Y.2d 958, 386 N.Y.S.2d 886, 353 N.E.2d 849 (1976).

<sup>167</sup> As the *Kimball* Court stated:

The rationale of the public-utility cases, as opposed to those in which circumstances have brought about a diminution of going-concern value although the owner remained free to transfer it, must therefore be that an exercise of the power of eminent domain which has the inevitable effect of depriving the owner of the going-concern value of his business is a compensable "taking" of property.

338 U.S. at 13 (citations omitted). See also *Omaha Water Co.*, 218 U.S. at 202-03.

in business property had been taken.<sup>168</sup> Even if the Laundry had had sufficient funds to set up a new plant without selling the old plant, it would have been left with two facilities when the temporary taking ceased. The trade routes themselves could not have been sold from year-to-year, nor could they have been transferred for a limited time and then regained by the Laundry. Thus, the government's temporary taking effectively eliminated the Laundry's ability to profit from its trade routes during the government's occupancy of its premises.<sup>169</sup>

The Court therefore concluded that a distinction should be drawn between a permanent taking of a fee simple to business property and a temporary taking of the same.<sup>170</sup> The Court viewed it as highly probable that the owner would be able to transfer the going-concern value in the first instance, and believed that any losses resulting from the owner's inability to do so would be "speculative."<sup>171</sup> The likelihood that the owner would be able to effect a temporary transfer of going-concern value during a temporary taking, however, was so remote as to give rise to a requirement for compensation: "The temporary interruption as opposed to the final severance of occupancy so greatly narrows the range of alternatives open to the condemnee that it substantially increases the condemnor's obligation to him. It is a difference in degree wide enough to require a difference in result."<sup>172</sup>

#### IV. CURRENT STATUS OF THE BUSINESS LOSSES RULE: THE TREND TOWARD ALLOWING COMPENSATION

The general rule, then, is that business losses are noncompensable. This rule has been subject to harsh criticism, however,<sup>173</sup>

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<sup>168</sup> 338 U.S. at 14.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 14-15.

<sup>171</sup> *Id.* at 12 (citation omitted).

<sup>172</sup> *Id.* at 15 (citations omitted). Although compensation was allowed in *Kimball Laundry*, the Court was sharply divided, with four justices dissenting. Justice Douglas, writing for the dissent, found it "a mystery" why compensation would be allowed in a temporary taking that diminished the value of trade routes, but would be prohibited where such value was destroyed by a permanent taking. *Id.* at 23 (Douglas, J., dissenting). In his view, because the government did not want, and could not use, the laundry's trade routes, it was not required to pay for them. *Id.* at 23-24. He believed that the majority's rule forced the government to pay not for what it received, but for what the owner had lost. That, however, was precisely the result that the majority had intended: "Since what the owner had has transferable value, the situation is apt for the oft-quoted remark of Mr. Justice Holmes, 'the question is what has the owner lost, not what the taker has gained.'" *Id.* at 13 (quoting *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910)).

<sup>173</sup> See, e.g., sources cited *supra*, note 1.

and that criticism has intensified dramatically in recent years. As a result, several jurisdictions have started to temper, or even eliminate, the business losses rule, through either legislative or judicial means, or, in the case of Louisiana, through constitutional reform. These new developments are described below, and serve as the foundation for the analysis in Part V.

### A. Legislative Reform

Many of the courts denying recovery for business losses have sharply criticized the rule, but have concluded nonetheless that any remedy must be legislative, rather than judicial, in nature.<sup>174</sup> State legislatures clearly are empowered to authorize recovery for business losses created by the acquisition of land by the state or any of its entities,<sup>175</sup> and several of them have chosen to do just that. In the early part of the century, such legislation took the form of special statutes designed to alleviate specific intrusions; in recent years, several states have enacted more comprehensive legislation designed to address a broader range of problems.<sup>176</sup> Yet all of these

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<sup>174</sup> See, e.g., *Auraria Businessmen Against Confiscation, Inc. v. Denver Urban Renewal Auth.*, 183 Colo. 441, 446, 517 P.2d 845, 847-48 (1974); *Department of Transp. v. Fortune Fed. Sav. & Loan Ass'n*, 532 So. 2d 1267, 1270 (Fla. 1988).

<sup>175</sup> See, e.g., *Earle v. Commonwealth*, 180 Mass. 579, 63 N.E. 10 (1902). In *Earle*, the Massachusetts Supreme Judicial Court noted:

The test of what may be required to be paid for if destroyed or damaged under the power of eminent domain, is not whether the same thing could have been sold, nor is it whether the destruction or harm could have been authorized without a provision for payment. Very likely the plaintiff's rights were of a kind that might have been damaged if not destroyed without the constitutional necessity of compensation. But some latitude is allowed to the Legislature. It is not forbidden to be just in some cases where it is not required to be by the letter of paramount law.

*Id.* at 582-83, 63 N.E. at 10. See also *United States v. Fuller*, 409 U.S. 488, 494 (1973) ("Congress may . . . provide in connection with condemnation proceedings that particular elements of value or particular rights be paid for even though in the absence of such provision the Constitution would not require payment."); *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 676-77 (1923) ("[W]hile the legislature was powerless to diminish the constitutional measure of just compensation, we are aware of no rule which stands in the way of an extension of it, within the limits of equity and justice, so as to include rights otherwise excluded."); *People ex rel. Burhans v. City of New York*, 198 N.Y. 439, 446, 92 N.E. 18, 20 (1910) ("That, as the right to exercise the power of eminent domain must proceed from legislative authority, the Legislature may require more liberal compensation than that which would satisfy the constitutional requirement, but it cannot direct that anything less than just compensation shall be made.") (quoting *In re Water Front in New York*, 190 N.Y. 350, 354, 83 N.E. 299, 300 (1907)).

<sup>176</sup> In the Uniform Relocation Assistance Act and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§ 4602-55 (1988) (the "Act"), Congress sought to afford aggrieved

statutes reflect legislative compromises. None of them provide comprehensive recovery for business owners. Rather, in each instance, we see the legislatures picking and choosing among categories of aggrieved landowners, offering compensation (usually quite limited in scope) to some and denying it to others.

### 1. The Water Supply Acts

Around the turn of the century, several eastern states built large reservoirs to provide adequate water supply to their populations. Many of these projects flooded entire towns or villages. The states naturally compensated the property owners for their land in accordance with state constitutional provisions, but the losses suffered went much further than that. Not only was the business owner's business physically destroyed, but his or her goodwill and going-concern value were undeniably destroyed as well, because the clientele's land was also taken and the customer base scattered.<sup>177</sup>

Although the constitutions of these states did not mandate compensation for these business losses, many plaintiffs nonetheless

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property owners at least some recompense in federal takings. The stated purposes of the Act were to put the property owner in the same economic position as he or she would have been in absent the condemnation, *see id.* § 4621, and to encourage the property owner to settle voluntarily with the United States government, thereby reducing the federal courts' caseload in determining just compensation. *Id.* § 4651.

The Act gives a "displaced person," defined as one who moves from real property, or moves personalty from real property, as a result of the acquisition of the real property for a program undertaken by the federal government or undertaken with federal financial assistance, *id.* § 4601(6), two options. The business owner can recover actual expenses, consisting of: (1) reasonable moving expenses; (2) direct losses of tangible personal property, limited to the amount it would have cost to relocate such property; and (3) reasonable expenses incurred in searching for a replacement business. *Id.* § 4622(a). Alternatively, the owner may recover a fixed amount (of not less than \$2,500 or more than \$10,000) equal to the average annual net earnings, defined in § 4622(c) of the Act, of the business, provided the federal agency involved determines:

- (1) The business cannot be relocated without a substantial loss of its existing patronage;
- and
- (2) The business is not part of a commercial enterprise having at least one other establishment that is not being acquired by the United States, which is engaged in the same or similar business.

*Id.* § 4622(b). A number of states have enacted similar statutes allowing the same limited recovery. *See, e.g.,* CONN. GEN. STAT. ANN. §§ 13a-73, 13a-76a (West 1988 & Supp. 1990); NEB. REV. STAT. §§ 76-1203 to -1205 (1986); R.I. GEN. LAWS § 37-6.1 to -6.3 (1984); WIS. STAT. ANN. § 32.19 (West 1989). *See generally* 6A NICHOLS, *supra* note 14, §§ 34.1-34.3; Annotation, *Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970*, 33 A.L.R. FED. 9 (1977 & Supp. 1990).

<sup>177</sup> *See generally* Sackman, *Business Damages—New Concerns*, 1977 INST. ON PLAN., ZONING, & EMINENT DOMAIN 255, 278-79.



were able to seek relief under statutory provisions enacted to alleviate the extreme hardship inflicted upon business owners.<sup>178</sup> The legislatures tended to provide rather broad forms of recovery to business owners, and the courts tended to be generous in meting out recoveries.<sup>179</sup> The governmental entities required by these statutes to pay compensation protested, arguing that the payment of these damages exceeded the constitutional requirements of just compensation. The courts quickly established, however, that the state constitutions set minimum, not maximum, requirements for just compensation, and that the legislatures were free to mandate higher compensation if they so desired.<sup>180</sup>

Thus, early precedent existed for statutory provisions providing recovery for business losses suffered as a result of condemnation actions. These statutes provided for compensation for business losses arising only out of relatively specific, narrow circumstances, however, limited in both geographic application and in duration. Much more interesting are the statutes that several states have enacted in recent years. Although these new statutes apply to somewhat broader circumstances, they tend to provide less comprehensive relief than these early water supply statutes.

## 2. Florida

In 1933, Florida became the first state to pass a statute allowing recovery of business losses that was not project-specific.<sup>181</sup> The Flor-

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<sup>178</sup> See, e.g., *Joslin Mfg.*, 262 U.S. at 675 (Rhode Island statute); *City of Oakland v. Pacific Coast Lumber & Mill Co.*, 171 Cal. 392, 398, 153 P. 705, 707 (1915) (not allowing damages for goodwill because California statute did not recognize such losses); *Whiting v. Commonwealth*, 196 Mass. 468, 470, 82 N.E. 670, 671 (1907) (Massachusetts statute); *In re Board of Water Supply*, 211 N.Y. 174, 179-81, 105 N.E. 213, 215-16 (1914) (New York statute); see also 1 L. ORGEL, *supra* note 40, § 79.

<sup>179</sup> For example, the courts found that "business" within the meaning of the statutes would extend to include a farmer, *Allen v. Commonwealth*, 188 Mass. 59, 61, 74 N.E. 287, 288 (1905), a doctor, *Earle v. Commonwealth*, 180 Mass. 579, 583, 63 N.E. 10, 10 (1902); *In re Board of Water Supply*, 81 Misc. 19, 22-23, 142 N.Y.S. 83, 85-86, *aff'd*, 159 A.D. 279, 144 N.Y.S. 373 (1913), and boarding-house keepers, *People ex rel. Burhans v. City of New York*, 198 N.Y. 439, 447, 92 N.E. 18, 20 (1910). The Massachusetts Supreme Judicial Court held that a woman who kept occasional boarders, but who was not engaged in the regular business of keeping boarders, was not entitled to compensation. *Gavin v. Commonwealth*, 182 Mass. 190, 191, 65 N.E. 37, 37 (1902).

<sup>180</sup> Legislatures remain free to award compensation in excess of that constitutionally mandated. See cases cited in note 175 *supra*. See generally 3 NICHOLS, *supra* note 14, § 8.9 & nn. 83 & 84 and cases cited therein. They are, of course, forbidden to reduce the compensation available below the minimum required by the constitution. See *id.* & n.82 and cases cited therein.

<sup>181</sup> 1933 Fla. Laws ch. 15927 (No. 70), amending § 5089 of the Compiled General Laws

ida statute is hardly an expansive grant of legislative relief to all business owners injured by condemnation actions. Rather, it provides compensation for business damages accruing to an established business where a public condemning authority takes a part of the property for a right-of-way.<sup>182</sup> Florida courts, like those of most states, consider recovery of business losses to be "strictly a matter of legislative grace, not constitutional imperative."<sup>183</sup> They regard business losses as "intangibles" that "do not constitute 'property' in the constitutional sense" and are hence noncompensable.<sup>184</sup> There-

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of Florida, *previously* § 3281 of the Revised General Statutes of Florida. This provision became Florida Statute § 73.10(4), and was renumbered in 1965 to Florida Statute § 73.071(3)(b). This provision states:

(3) The jury shall determine solely the amount of compensation to be paid, which compensation shall include:

.....

(b) Where less than the entire property is sought to be appropriated, any damages to the remainder caused by the taking, including, when the action is by the Department of Transportation, county, municipality, board, district or other public body for the condemnation of a right-of-way, and the effect of the taking of the property involved may damage or destroy an established business of more than 5 years' standing, owned by the party whose lands are being so taken, located upon adjoining lands owned or held by such party, the probable damages to such business which the denial of the use of the property so taken may reasonably cause; any person claiming the right to recover such special damages shall set forth in his written defenses the nature and extent of such damages . . . .

FLA. STAT. ANN. § 73.071(3)(b) (West 1987).

<sup>182</sup> *Id.* The Florida constitution mandates that severance damages be paid as a part of the full compensation for damages to the remainder caused by a partial taking of land. *See* Division of Admin. v. Ness Trailer Park, Inc., 489 So. 2d 1172, 1180 (Fla. Dist. Ct. App.) (citing Daniels v. State Rd. Dep't, 170 So. 2d 846, 851 (Fla. 1964)), *review denied*, 501 So. 2d 1281 (Fla. 1986). Business damages, on the other hand, are created by statute and compensate for damages, such as loss of goodwill or profits, to a business indirectly caused by a taking of adjoining, adjacent, or contiguous land. *See* Matthews v. Division of Admin., 324 So. 2d 664, 668 (Fla. Dist. Ct. App. 1975); LeSuer v. State Rd. Dep't, 231 So. 2d 265, 268 (Fla. Dist. Ct. App. 1970). Although recovery of both types of damages is available in appropriate cases, *Ness Trailer Park*, 489 So. 2d at 1180-81, where the condemnee's business damages and severance damages are identical, the courts will not permit dual recovery. *See* Glessner v. Duval County, 203 So. 2d 330, 335 (Fla. Dist. Ct. App. 1967).

<sup>183</sup> Florida Power & Light Co. v. First Nat'l Bank & Trust Co., 448 So. 2d 1141, 1142 (Fla. Dist. Ct. App. 1984); *see also* Texaco, Inc. v. Department of Transp., 537 So. 2d 92, 93 (Fla. 1989); Tampa-Hillsborough County Expressway Auth. v. K.E. Morris Alignment Serv., Inc., 444 So. 2d 926, 928 (Fla. 1983); Jamesson v. Downtown Dev. Auth., 322 So. 2d 510, 511 (Fla. 1975).

<sup>184</sup> *Jamesson*, 322 So. 2d at 511 (citing Backus v. Fort St. Union Depot Co., 169 U.S. 557 (1898)). The Florida courts, however, do not generally employ a restrictive definition of "property:"

The rationale for granting compensation, although not always expressed in judicial pronouncements, is that "property" is something more than a physical interest in land; it also includes certain legal rights and privileges constituting

fore, unless the taking falls within the relatively narrow confines of the statute, the general rule that business losses are noncompensable will apply.

Recovery of business losses is permitted only where the business is located upon land adjoining, adjacent, or contiguous to the land taken.<sup>185</sup> If the business is located entirely upon the land taken, no relief may be had.<sup>186</sup> The legislative rationale apparently is that where a total taking of the land has occurred, the property owners will receive the "full compensation" required by the Florida constitution,<sup>187</sup> thus obviating the need for business damages.<sup>188</sup> Furthermore, the property must be actually appropriated; no recovery is allowed for consequential damages arising from governmental actions such as a change of grade in the road<sup>189</sup> or construction of a median<sup>190</sup> or an overpass,<sup>191</sup> nor may business owners recover for temporary loss of business resulting from a construction project<sup>192</sup> or from loss of traffic flow past a business.<sup>193</sup>

The business owner's property must have been condemned by a governmental agency or political subdivision of the State of Florida. The statute does not require compensation where a "private" condemnor<sup>194</sup> takes prop-

appurtenants to the land and its enjoyment. This is part of a gradual process of judicial liberalization of the concept of property so as to include the "taking" of an incorporeal interest . . . .

*Palm Beach County v. Tessler*, 538 So. 2d 846, 848 (Fla. 1989) (quoting *Department of Transp. v. Stubbs*, 285 So. 2d 1, 2 (Fla. 1973)).

<sup>185</sup> *Guarria v. State Rd. Dep't*, 117 So. 2d 5, 6 (Fla. Dist. Ct. App. 1960); *see also State Rd. Dep't v. Bramlett*, 189 So. 2d 481, 483 (Fla. 1966); *Douglass v. Hillsborough County*, 206 So. 2d 402, 403-04 (Fla. Dist. Ct. App. 1968).

<sup>186</sup> *Texaco*, 537 So. 2d at 94; *see Amerkan v. City of Hialeah*, 534 So. 2d 796, 797 (Fla. Dist. Ct. App. 1988), *review denied*, 544 So. 2d 199 (Fla. 1989).

<sup>187</sup> The Florida Constitution states: "No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner." FLA. CONST. art. 10, § 6(a).

<sup>188</sup> *See Koval & Sasso, The Bottom Line on Eminent Domain Business Damages*, FLA. B.J., June 1986, at 59, 60.

<sup>189</sup> *State Rd. Dep't v. Lewis*, 170 So. 2d 817, 819 (Fla. 1964).

<sup>190</sup> *Division of Admin. v. Capital Plaza, Inc.*, 397 So. 2d 682, 683 (Fla. 1981); *Division of Admin. v. Palm Beach West, Inc.*, 409 So. 2d 1130, 1131 (Fla. Dist. Ct. App. 1982) (*per curiam*).

<sup>191</sup> *Lewis*, 170 So. 2d at 819.

<sup>192</sup> *Howard Johnson Co. v. Division of Admin.*, 450 So. 2d 328, 329 (Fla. Dist. Ct. App. 1984).

<sup>193</sup> *Capital Plaza*, 397 So. 2d at 683; *Meltzer v. Hillsborough County*, 167 So. 2d 54, 55 (Fla. Dist. Ct. App. 1964).

<sup>194</sup> A number of non-governmental entities are empowered under Florida law to condemn property, including electric utilities, FLA. STAT. ANN. § 361.01 (West 1968 & Supp.

erty.<sup>195</sup> Likewise, the property must be taken for a right-of-way; takings for any other public purpose do not suffice. The statute further requires that the business have been established for more than five years before the taking of the land. The courts have interpreted "business" to mean more than just a "place of business;" that is, more than just a physical location from which a business can be operated. According to one court, "[b]usiness . . . does not, generally speaking, mean property. It means the activity, the energy, the capacity, the opportunities by which results are reached—a condition rather than fixed tangible objects from which conditions arise."<sup>196</sup> Thus, it is not necessary that the current owner have operated the business for a full five years; it is only necessary that the business itself have been operated at that location for at least five years.<sup>197</sup>

Although the strict requirements outlined above suggest that the legislature wished to limit recoveries, the statute defines business damages broadly. In addition to lost profits attributable to the reduced profit-making ability of the business caused by the taking,<sup>198</sup> a business owner may recover items such as loss of business opportunity or loss of goodwill.<sup>199</sup> Even a business that is losing money is entitled to compensation for any business damages that the owner can prove flow from denial of use of the property, such as moving expenses or loss of goodwill.<sup>200</sup> Business losses must be pleaded

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1990), gas companies, *id.* § 361.05, water works companies, *id.* § 361.04, and railroads, *id.* § 361.025.

<sup>195</sup> See *Florida Power & Light Co. v. First Nat'l Bank & Trust Co.*, 448 So. 2d 1141, 1142 (Fla. Dist. Ct. App. 1984). This provision has been criticized as unfairly discriminating against business owners based upon the identity of the condemning authority. See Turk, *Entitlement to Business Damages in Condemnation Actions*, FLA. B.J., Oct. 1984, at 540, 541. The Florida courts, however, have repeatedly stated that "the remedy belongs within the legislative domain." *Florida Power & Light Co.*, 448 So. 2d at 1142; see also *Sasnett v. Tampa Elec. Co.*, 513 So. 2d 157, 159 (Fla. Dist. Ct. App. 1987).

<sup>196</sup> *Hodges v. Division of Admin.*, 323 So. 2d 275, 277 (Fla. Dist. Ct. App. 1975) (quoting *Atlanta Realty Co. v. Sloan*, 91 Ga. App. 370, 372, 85 S.E.2d 635, 637 (1955)); see also *Hicks v. Department of Transp.*, 541 So. 2d 1309, 1310-11 (Fla. Dist. Ct. App. 1989); *Division of Admin. v. Lake of the Woods, Inc.*, 404 So. 2d 186, 187-88 (Fla. Dist. Ct. App. 1981).

<sup>197</sup> *Tampa-Hillsborough County Expressway Auth. v. K.E. Morris Alignment Serv., Inc.*, 444 So. 2d 926, 929 (Fla. 1983).

<sup>198</sup> See *Matthews v. Division of Admin.*, 324 So. 2d 664, 666 (Fla. Dist. Ct. App. 1975).

<sup>199</sup> See *LeSuer v. State Rd. Dep't*, 231 So. 2d 265, 268 (Fla. App. 1970); *Douglass v. Hillsborough County*, 206 So. 2d 402, 403-04 (Fla. App. 1968); *Matthews*, 324 So. 2d at 666-67.

<sup>200</sup> *Matthews*, 324 So. 2d at 668 ("Goodwill need not be valued with reference to profit and loss. Goodwill can exist as a valuable asset even in a business which only shows a lose [sic].").

specifically, however, and the burden of proof is on the property owner.<sup>201</sup>

To recover under Florida law, therefore, the property owner's land must be partially, not wholly, taken by a governmental unit for a right-of-way, and the business must be located on the remaining land and have been in existence for more than five years. Obviously, a lot of takings resulting in business losses fall outside of these narrow confines and thus are not compensable. Florida's statute can hardly be said to be a broad legislative recognition of the need to provide recovery for business losses.

### 3. Vermont

In 1957, Vermont enacted a statute permitting recovery for business losses accruing as a result of the construction of highways.<sup>202</sup> This provision is much simpler than the Florida statute, providing merely that property owners should be compensated for "the direct and proximate decrease in the value" of a business located on property that is to be taken.<sup>203</sup>

Before this statute was enacted, Vermont law computed condemnation damages by the market value rule, *i.e.*, the difference between the value of the whole tract before the condemnation and its value afterwards, with no compensation for business losses.<sup>204</sup> The state constitution<sup>205</sup> did not mandate compensation for business losses, even though the business enterprise might be invaded and the income of the business diminished or destroyed because of a

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<sup>201</sup> See *Whitehead v. Florida Power & Light Co.*, 318 So. 2d 154, 157-59 (Fla. Dist. Ct. App. 1975).

<sup>202</sup> Act of June 21, 1957, 1957 Vt. Laws 242 (currently codified, as amended, at Vt. STAT. ANN. tit. 19, § 501 (1987)).

<sup>203</sup> Vt. STAT. ANN. tit. 19, § 501(2) (1987). This provision states:

Damages resulting from the taking or use of property under the provisions of this chapter shall be the value for the most reasonable use of the property or right in the property, and of the business on the property, and the direct and proximate decrease in the value of the remaining property or right in the property and the business on the property. The added value, if any, to the remaining property or right in the property, which accrues directly to the owner of the property as a result of the taking or use, as distinguished from the general public benefit, shall be considered in the determination of damages.

*Id.*

<sup>204</sup> See, *e.g.*, *Demers v. City of Montpelier*, 120 Vt. 380, 387, 141 A.2d 676, 681 (1958); *Nelson v. State Highway Bd.*, 110 Vt. 44, 52, 53, 1 A.2d 689, 692 (1938); *Essex Storage Elec. Co. v. Victory Lumber Co.*, 93 Vt. 437, 448, 108 A. 426, 430 (1919).

<sup>205</sup> The Vermont constitution provides, in relevant part: "That private property ought to be subservient to public uses when necessity requires it, nevertheless, whenever any person's property is taken for the use of the public, the owner ought to receive an equivalent in money." Vt. CONST. ch. 1, art. 2.

taking of the land on which the business was located.<sup>206</sup> The legislature was aware, however, of the inequities and uncompensated injuries caused by condemnation actions, particularly those actions undertaken to facilitate highway construction.<sup>207</sup> The statute thus represents the legislature's attempt to balance the rights of the individual proprietor against the needs of the sovereign to provide public improvements.<sup>208</sup>

The Vermont Supreme Court has carefully delineated the scope and effect of the statute since its enactment over three decades ago. Business owners can recover for the value of the land taken, the value of the loss of business, and the damage suffered by the remaining land when only a part of the parcel is taken, *i.e.*, severance damages.<sup>209</sup> A business owner thus can recover for both the loss of the land and the loss of the business, though double recovery is not allowed.<sup>210</sup>

According to the pronouncements of the Vermont Supreme Court, an award for business losses is appropriate only where "a business is inextricably related to the property on which it is carried on so that the taking results in subjecting the business to a loss, which would not be compensated for by paying for the value of the land alone."<sup>211</sup> Often, a taking of land will have only a slight impact on the business, and the impact may not necessarily be a negative one.<sup>212</sup> In such an instance, the Vermont courts would not award recovery for business losses. The Vermont Supreme Court recently clarified the procedure for computing business losses in *Sharp v. Transportation Board*.<sup>213</sup> The *Sharp* court defined the business loss suffered by the condemnee as the amount remaining, if any, when the value of the business as a whole<sup>214</sup> is subtracted from the value

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<sup>206</sup> *Record v. State Highway Bd.*, 121 Vt. 230, 237, 154 A.2d 475, 480 (1959).

<sup>207</sup> *See id.*

<sup>208</sup> *See id.*

<sup>209</sup> *Penna v. State Highway Bd.*, 122 Vt. 290, 292, 170 A.2d 630, 632 (1961).

<sup>210</sup> *Id.* at 292-93, 170 A.2d at 633.

<sup>211</sup> *Colson v. State Highway Bd.*, 122 Vt. 392, 395, 173 A.2d 849, 852 (1961) (citing *Record*, 121 Vt. at 237, 154 A.2d at 480), *overruled on different grounds*, *Pidgeon v. Vermont State Transp. Bd.*, 147 Vt. 584, 522 A.2d 248 (1987).

<sup>212</sup> *Record*, 121 Vt. at 237, 154 A.2d at 480.

<sup>213</sup> 141 Vt. 480, 491-93, 451 A.2d 1074, 1079-80 (1982).

<sup>214</sup> According to the Vermont Supreme Court:

The value of the business as a whole includes (a) the contribution made by the land to the business, (b) the personal property used by the business, (c) the going concern value of the business, (d) the increased value derived from the fact that tangible assets are combined in a single unit and are already functioning in the marketplace, and (e) where appropriate, goodwill.

*Id.* at 491, 451 A.2d at 1079.

of the highest and best use of the land.<sup>215</sup> If nothing remains, the condemnee has not suffered any business loss.<sup>216</sup> Although loss of profits may be shown to help establish the business losses sustained, no separate recovery may be had for lost profits; rather, they are subsumed in the recovery for loss of business.<sup>217</sup>

A business owner can receive an award for business losses even if the business is not totally destroyed.<sup>218</sup> An award for a partial business loss cannot exceed the measure of a total loss, however, nor may a business loss award exceed the proven market value of the business.<sup>219</sup> If the business must be relocated in whole or in part as a result of the taking, the court must look to see what, if any, loss the business has suffered as a result of the relocation.<sup>220</sup> Again, an award of relocation costs cannot exceed the value of the going business at the original location.<sup>221</sup>

The Vermont courts have had little trouble dismissing the old chestnut that business losses are too speculative to permit recovery. In drafting the statute, the legislature undoubtedly recognized the difficulty in determining whether business yield has been affected by a taking, whether such effect was adverse, and how to place a dollar value upon the injury if it was adverse.<sup>222</sup> Nonetheless, the issue is merely a factual one, and the courts must make their determinations as best they can, based upon whatever evidence is given, be it proof of profits,<sup>223</sup> valuation by the proprietor,<sup>224</sup> or otherwise. Mere difficulty in determining the exact amount owing is not sufficient to bar recovery ordained by the legislature.<sup>225</sup>

The Vermont statute provides for recovery of a broad range of business losses, including, as it does, both going-concern value

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<sup>215</sup> *Id.*

<sup>216</sup> *Id.* It is irrelevant if the actual use is different from the highest and best use. The condemnee in *Sharp* used his land for a dairy operation. Although his dairy business was destroyed by the taking of his land, he could not recover for business losses because the value of the land if used for its highest and best use—subdivision for residential purposes—exceeded the value of his business. *Id.* at 488, 451 A.2d at 1077.

<sup>217</sup> *Id.*

<sup>218</sup> *Gibson Estate v. State Highway Bd.*, 128 Vt. 47, 53, 258 A.2d 810, 813 (1969).

<sup>219</sup> *Id.*

<sup>220</sup> *Record v. State Highway Bd.*, 121 Vt. 230, 237, 154 A.2d 475, 480 (1959).

<sup>221</sup> *Gibson Estate*, 128 Vt. at 53, 258 A.2d at 813-14.

<sup>222</sup> *See Fiske v. State Highway Bd.*, 124 Vt. 87, 91, 197 A.2d 790, 792 (1964).

<sup>223</sup> *Id.* at 92, 197 A.2d at 793.

<sup>224</sup> *Id.* at 91, 197 A.2d at 793 (citing *O'Brien v. State Highway Bd.*, 123 Vt. 414, 417, 190 A.2d 699, 701 (1963)).

<sup>225</sup> *Id.* at 92, 197 A.2d at 793 (citing *Penna v. State Highway Bd.*, 122 Vt. 290, 292, 170 A.2d 630, 632 (1961)).

and goodwill. Nonetheless, like the Florida statute, the Vermont statute is severely restricted in scope, allowing recovery only for business losses resulting from takings for highway construction, and no other purpose. There is no analytically valid reason why the use to which the land is to be put after the taking should determine whether compensation is available. A business loss incurred as a result of a taking for non-highway uses is just as real and just as injurious, and therefore is just as deserving of compensation.

#### 4. California and Wyoming: Adoption of Section 1016 of the Uniform Eminent Domain Code

Section 1016 of the Uniform Eminent Domain Code provides for recovery for loss of goodwill.<sup>226</sup> Only two states have adopted the uniform language thus far: Wyoming and California. Little can be said as yet about Wyoming's interpretation of the provision. Before its adoption of the uniform language in 1981,<sup>227</sup> Wyoming, like most states, denied recovery for business losses.<sup>228</sup> Because the Wyoming courts have not yet had occasion to rule on the new statutory relief, it is difficult to predict how they will interpret the language.

Section 1263.510 of the California Code of Civil Procedure,<sup>229</sup> however, provides some indication of the types of issues that the

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<sup>226</sup> This section states:

(a) In addition to fair market value determined under Section 1004, the owner of a business conducted on the property taken, or on the remainder if there is a partial taking, shall be compensated for loss of goodwill only if the owner proves that the loss (1) is caused by the taking of the property or the injury to the remainder, (2) cannot reasonably be prevented by a relocation of the business or by taking steps and adopting procedures that a reasonably prudent person would take and adopt in preserving the goodwill, (3) will not be included in relocation payments under Article XIV, and (4) will not be duplicated in the compensation awarded to the owner.

(b) Within the meaning of this section, "goodwill" consists of the benefits that accrue to a business as a result of its location, reputation for dependability, skill, or quality, and any other circumstances resulting in probable retention of old or acquisition of new patronage.

UNIFORM EMINENT DOMAIN CODE: OFFICIAL TEXT WITH COMMENTS § 1016 (1974). "Business," for the purposes of the Code, is defined as "a lawful activity, whether or not for profit, other than a farm operation, conducted primarily for the purchase, sale, lease, rental, manufacture, processing, or marketing of products, commodities, or other property, or for providing services." *Id.* § 103(3).

<sup>227</sup> WYO. STAT. § 1-26-713 (1988).

<sup>228</sup> See *Coronado Oil Co. v. Grieves*, 642 P.2d 423, 435 (Wyo. 1982); *State Highway Comm'n v. Scrivner*, 641 P.2d 735, 739 (Wyo. 1982).

<sup>229</sup> This section states:



Wyoming statute may present. This provision, virtually identical to that found in Wyoming, renders loss of goodwill compensable, at least to a certain extent, in takings occurring in California on or after July 1, 1976.<sup>230</sup> Although the California Supreme Court has had only one occasion to rule on section 1263.510 to date,<sup>231</sup> we can nonetheless get a better sense of the strengths and weaknesses of the uniform language in that jurisdiction.

Historically, California courts held that loss of goodwill was not recoverable in condemnation actions. The California Supreme Court first articulated its position on this issue in 1915, in *City of Oakland v. Pacific Coast Lumber & Mill Co.*, in which it stated: "it is the universal rule of construction that an injury or inconvenience to a business is *damnum absque injuria* and does not form an element of the compensating damages to be awarded."<sup>232</sup> As recently as 1975, the California court declined to hold goodwill compensable as a matter of state or federal law.<sup>233</sup> Thus, goodwill is compensable in California only as a matter of legislative grace and only to the extent provided for in section 1263.510.

The California legislature's extensive review and reform of eminent domain law in 1975 resulted in the adoption of the new statute permitting recovery for loss of goodwill.<sup>234</sup> This Act is inter-

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(a) The owner of a business conducted on the property taken, or on the remainder if such property is part of a larger parcel, shall be compensated for loss of goodwill if the owner proves all of the following:

(1) The loss is caused by the taking of the property or the injury to the remainder.

(2) The loss cannot reasonably be prevented by a relocation of the business or by taking steps and adopting procedures that a reasonably prudent person would take and adopt in preserving the goodwill.

(3) Compensation for the loss will not be included in payments under Section 7262 of the Government Code.

(4) Compensation for the loss will not be duplicated in the compensation otherwise awarded to the owner.

(b) Within the meaning of this article, "goodwill" consists of the benefits that accrue to a business as a result of its location, reputation for dependability, skill or quality, and any other circumstances resulting in probable retention of old or acquisition of new patronage.

CAL. CIV. PROC. CODE § 1263.510 (West 1982).

<sup>230</sup> See *id.*

<sup>231</sup> See *People ex rel. Dep't of Transp. v. Muller*, 36 Cal. 3d 263, 268-72, 681 P.2d 1340, 1343-46, 203 Cal. Rptr. 772, 775-78 (1984). See *infra* notes 237-41 and accompanying text for a discussion of *Muller*.

<sup>232</sup> 171 Cal. 392, 398, 153 P. 705, 707 (1915) (citations omitted).

<sup>233</sup> *Community Redev. Agency v. Abrams*, 15 Cal. 3d 813, 830-31, 543 P.2d 905, 917-18, 126 Cal. Rptr. 473, 485-86 (1975), *cert. denied*, 429 U.S. 869 (1976).

<sup>234</sup> CAL. CIV. PROC. CODE § 1263.510 (West 1982) (quoted in *supra* note 229).

esting for a number of reasons. First, the provision actually defines "goodwill," stating that it "consists of the benefits that accrue to a business as a result of its location, reputation for dependability, skill or quality, and any other circumstances resulting in probable retention of old or acquisition of new patronage."<sup>235</sup> Because other provisions of California statutes also define "goodwill" in terms of the "expectation of continued public patronage,"<sup>236</sup> this raises the initial question of whether goodwill under the statute relates only to patronage. This question was answered in *People ex rel. Department of Transportation v. Muller*,<sup>237</sup> which provides the only substantive interpretation of this statute to date.

Muller and his wife had rented property to Muller and several other veterinarians for use as a veterinary hospital. After the Department of Transportation took the land, Muller was able to reopen his practice at a nearby location without loss of patronage or gross income. Because of higher purchase costs, however, his annual rent doubled, and his business's net income was reduced. The Department of Transportation argued that a compensable loss of goodwill occurred only when the taking resulted in a loss of patronage.<sup>238</sup> Here, the Department contended, the loss present was attributable only to the increase in rent resulting from a change in location, and therefore the government owed no compensation for goodwill.<sup>239</sup>

The *Muller* court, recognizing the expansive remedial purpose of the statute, rejected the argument that the statute required such a limited definition of "goodwill."<sup>240</sup> It noted that the statute authorizes compensation for the "benefits" of "location," and that "[t]here are other benefits to a particular location besides patronage."<sup>241</sup> In giving an expansive definition to "goodwill," the *Muller* court eliminated one problem associated with the statute and established that recovery is to be broadly granted.

The statute does not indicate how goodwill is to be valued. The *Muller* court explicitly stated that goodwill could be valued by any

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<sup>235</sup> CAL. CIV. PROC. CODE § 1263.510(b) (West 1982). For an argument that California's statutory definition of "goodwill" is economically incorrect, see Udinsky, *The Economics of "Goodwill": With An Application to the Eminent Domain Code Definition*, 6 BUS. L. NEWS (State Bar of Cal. Bus. L. Sect.), Spring 1983, at 33.

<sup>236</sup> E.g., CAL. BUS. & PROF. CODE § 14100 (West 1987).

<sup>237</sup> 36 Cal. 3d 263, 681 P.2d 1340, 203 Cal. Rptr. 772 (1984).

<sup>238</sup> *Id.* at 269, 681 P.2d at 1343, 203 Cal. Rptr. at 775.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at 270, 681 P.2d at 1344, 203 Cal. Rptr. at 776.

<sup>241</sup> *Id.* at 269, 681 P.2d at 1343, 203 Cal. Rptr. at 775.

means appropriate to the nature of the business and the purpose for which the evaluation was conducted.<sup>242</sup> The capitalized excess earnings approach used in *Muller* is the method most commonly used by accountants<sup>243</sup> and the Internal Revenue Service.<sup>244</sup> Because other valuations methods are permitted,<sup>245</sup> however, and because different methods can result in wide variance in the valuation figure,<sup>246</sup> the lack of a standard in the act makes it difficult for either party to predict in advance the amount of the damages owing in any particular taking.

The statute attempts to limit the amount of compensation due to a property owner. It provides compensation for loss of goodwill regardless of whether the land is taken in whole or in part,<sup>247</sup> but any special benefits to the remaining property must be offset against the owner's compensation for loss of goodwill. Dual recovery is not permitted; to the extent that loss of goodwill is duplicated in another loss for which compensation is granted, no recovery is allowed.<sup>248</sup>

The statute also places an affirmative duty on the business owner to mitigate his or her losses. The property owner must show that the loss could not be prevented by relocation or by other efforts to mitigate.<sup>249</sup> Though the mitigation requirement seems to be a sound one at first glance—after all, why should a business owner be allowed to collect for losses that he or she could have avoided—at least one commentator has noted that the statute leaves a number of questions unanswered.<sup>250</sup>

Dr. Muller was able to relocate with only a reduction in his net income. But what if that new facility had been so expensive that the business would have been unable to operate at a profit? Would he still be required to mitigate? What if Dr. Muller had not been able

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<sup>242</sup> *Id.* at 271 n.7, 681 P.2d at 1345 n.7, 203 Cal. Rptr. at 777 n.7.

<sup>243</sup> See generally H. HUGHES, *GOODWILL IN ACCOUNTING* (1982); G. CATLETT & N. OLSON, *ACCOUNTING FOR GOODWILL* (1968).

<sup>244</sup> See, e.g., Rev. Rul. 59-60, 1959-1 C.B. 237, 241.

<sup>245</sup> Typical valuation methods include capitalized excess earnings, gross income multipliers, and market value. See Desmond, *supra* note 29, at 196-202; Maleck, *Loss of Business Goodwill in Eminent Domain Proceedings*, 53 CAL. ST. B.J. 32, 33 (1978).

<sup>246</sup> See Skolnik, *New Vitality in Eminent Domain*, CAL. LAW, March 1985, at 55, 57 ("In one recent case, the two experts' opinions of compensable [sic] loss of business good will were \$0 and \$230,000; in another, \$100,000 and \$700,000; in a third, \$70,000 and \$525,000.").

<sup>247</sup> CAL. CIV. PROC. CODE § 1263.510(a)(1) (West 1982).

<sup>248</sup> *Id.* § 1263.510(a)(3), (4).

<sup>249</sup> *Id.* § 1263.510(2). In disputes over the valuation of real property, the property owner has no such burden of proof.

<sup>250</sup> See Zinehart, *Compensation for Loss of Goodwill: The California Experiment*, 1989 INST. ON PLAN., ZONING & EMINENT DOMAIN ch. 9, § 9.04[2][b].

to relocate within a mile of his old business as he did, but had had to move so far away that his loss of his old patronage was inevitable and unpreventable? Could he still recover for the loss of his old patronage even if he were able to quickly acquire new patronage of equal or greater value? The state could argue that the owner had not suffered any loss under those circumstances. Yet, absent the taking, the owner could have sold the goodwill at his former location and have established new goodwill (through the creation of new patronage) at the new location as well.<sup>251</sup> In real economic terms, the taking *has* caused the owner to suffer a loss.

What if the business is unable to relocate within the area of its existing patronage because of zoning restrictions or other constraints? For example, a pawnshop can easily find that it has become a nonconforming use;<sup>252</sup> likewise, a liquor store may well find that it cannot obtain a new license within its old locale. A loss of patronage appears inevitable for such businesses, for they can either relocate to a new area without such constraints, which may well be too far away to allow them to retain their existing patronage, or they can establish a new type of business within the old locale, which will also require the generation of new patronage.

Finally, the statute allows recovery only for loss of goodwill, and not for other types of business damages, such as loss of profits or going-concern value. The California Law Revision Commission Comment on section 1263.510 does not reveal the reasons for the distinction.<sup>253</sup> It may be that the legislature did not intend to make a distinction. As discussed above, "goodwill" and "going-concern value" are viewed by many as synonymous terms;<sup>254</sup> perhaps the California legislature and drafters of the uniform provision viewed them that way as well. Certainly, the statute contemplates recovery of goodwill where a business cannot be relocated.<sup>255</sup> Although the language refers specifically to goodwill, a business that cannot be relocated has also lost going-concern value as well, because it is now a "dead" plant rather than a "live" one.<sup>256</sup> Although the statute, read literally, refers to loss of goodwill, one wonders, given the

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<sup>251</sup> See *id.*

<sup>252</sup> See *id.*

<sup>253</sup> 13 CAL. LAW REVISION COMM'N REPORTS, RECOMMENDATIONS & STUDIES 1975-76, Comment, at 218-19.

<sup>254</sup> See *supra* notes 15-32 and accompanying text.

<sup>255</sup> See CAL. CIV. PROC. CODE § 1263.510(a)(2) (West 1982).

<sup>256</sup> See Malek, *supra* note 245, at 35; see *supra* note 22 and accompanying text for a discussion of the meaning of "going-concern value."

confusion surrounding the two terms, just what compensation the legislature did intend.<sup>257</sup> If the legislature did intend a distinction, however, it was likely based on the common fear of the California courts that awarding recovery for such losses would result in irreparable harm to the public fisc and would impede public projects.<sup>258</sup>

Thus, this most recent statutory grant of compensation for business losses, like all of the earlier legislative reforms, provides only limited recovery for business owners. The statute recognizes that business losses can result from takings, but creates a seemingly arbitrary limit on their recovery. Why should goodwill be compensable, but other types of business losses not be?

### B. *Judicial Reform*

The legislative reform that has occurred to date has tended to be haphazard and weak. The legislatures have drawn arbitrary lines between categories of landowners and classes of injury, creating a crazy-quilt pattern of recovery. Their decisions to afford limited relief to aggrieved property owners, although interesting from a policy stance, reveal little about changes in the theoretical underpinnings of the business losses rule. Much more interesting from a theoretical viewpoint are the recent changes wrought by the judiciary in the area of business losses. Courts in Georgia, Minnesota, Michigan, Wisconsin, and Alaska have all determined that, as a matter of state constitutional law, business losses are compensable, to varying degrees. Because these states start with constitutional provisions similar to those of the states denying compensation, and with comparable judicial histories of denying such recovery, their determinations in the last two decades that recovery is not only permitted, but mandated by law, evidence a fundamental shift in the legal reasoning underlying the business losses rule.

#### 1. Georgia

In *Bowers v. Fulton County*, decided in 1966, the Georgia Supreme Court became the first state court to require compensation for business losses as a matter of state constitutional law.<sup>259</sup> In so doing, the court rejected its own precedent, established in 1895, in

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<sup>257</sup> See Malek, *supra* note 245, at 35.

<sup>258</sup> See Kanner, *supra* note 1, at 76-85, for a discussion of California cases raising this issue.

<sup>259</sup> 221 Ga. 731, 740, 146 S.E.2d 884, 891 (1966).

*Pause v. City of Atlanta*,<sup>260</sup> which had held that the "just and adequate compensation" required by the Georgia constitution<sup>261</sup> did not require compensation for loss of profits and removal expenses as separate and independent items of damages. The *Bowers* court explicitly overruled *Pause* and other Georgia cases which had followed the *Pause* line of reasoning.<sup>262</sup>

According to the *Bowers* court, *Pause* and its progeny misdefined the word "property." These pre-*Bowers* cases had construed the Georgia takings provision as applying only to physical or corporeal property, a view the *Bowers* court rejected as "too narrow."<sup>263</sup> Rather, the *Bowers* court found that the constitution included all species of property within its scope, whether real or personal, corporeal or incorporeal.<sup>264</sup> The court explicitly rejected the notion

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<sup>260</sup> 98 Ga. 92, 26 S.E. 489 (1895).

<sup>261</sup> The Georgia constitution states that "private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid." GA. CONST. art. I, § 3, ¶ 1(a).

<sup>262</sup> 221 Ga. at 738, 146 S.E.2d at 890. The *Bowers* court found that the "rules" announced in these cases were "obiter dictum" because the cases:

either did not involve the taking or directly damaging of the condemnnee's physical property by the condemnnor, but were suits in which damages were claimed because improvements made by the condemnnor rendered less valuable the condemnnee's premises or in which no claim for damages was made on account of damage to the condemnnee's business or for expenses incurred by him.

*Id.* at 736-37, 146 S.E.2d at 889. Thus, these cases did not require a construction of the takings clause of the Georgia constitution. *Id.* The court cited specifically: *Nelson v. City of Atlanta*, 138 Ga. 252, 253-54, 75 S.E. 245, 246 (1912) (diminution of value of adjacent property caused by construction of viaduct); *Howard v. County of Bibb*, 127 Ga. 291, 291, 56 S.E. 418, 418 (1907) (seeking damages for death of cows caused by construction of dam); *Barfield v. Macon County*, 109 Ga. 386, 386-87, 34 S.E. 596, 596 (1899) (damages to adjacent land caused by alteration in roadbed); *Austin v. Augusta T. Ry.*, 108 Ga. 671, 672, 34 S.E. 852, 853 (1899) (diminution in value of building caused by construction of railroad); *Pause*, 98 Ga. at 93-95, 26 S.E. at 490 (diminution in value of business caused by construction of a viaduct); *Peel v. City of Atlanta*, 85 Ga. 138, 139, 11 S.E. 582, 583 (1890) (damages to land adjacent to opening at public street); *Smith v. Floyd County*, 85 Ga. 420, 420, 11 S.E. 850, 850 (1890) (damages to residential lot from building of bridge).

<sup>263</sup> 221 Ga. at 737, 146 S.E.2d at 889.

<sup>264</sup> *Id.* The court stated:

The term "property" is a very comprehensive one, and is used not only to signify things real and personal owned, but to designate the right of ownership and that which is subject to be owned and enjoyed. The term [property] comprehends not only the thing possessed, but also, in strict legal parlance, means the rights of the owner in relation to land or a thing; the right of a person to possess, use, enjoy and dispose of it, and the corresponding right to exclude others from the use.

*Id.* at 737, 146 S.E.2d at 890 (quoting *Woodside v. City of Atlanta*, 214 Ga. 75, 83, 103 S.E.2d 108, 114-15 (1958) (citations omitted)).

that the loss of the business would be reflected in the value of the real estate, because the value of an established business can greatly exceed that of the real property on which it is located.<sup>265</sup> The *Bowers* court noted that if a valuable business is located within a shabby building worth only a fraction of the value of the business, the value of the business can hardly be said to be included in the appraisal of the building.<sup>266</sup> Thus, the court concluded that the destruction of an established business must be a separate item of recovery from the value of the real estate, and that the condemnee could recover for all damage to the condemnee's property and expense caused by the condemnation proceeding.<sup>267</sup>

Although *Bowers* established that business losses, including loss of profits and diminution of the business, are compensable under the Georgia constitution, subsequent cases have restricted the rule. A "uniqueness" rule now applies: "Generally stated, the rule is that the fair market value of the property will be the fair measure of compensation, and claimed loss of business will not be considered, unless the condemnee has proved that the condemned property has some unique or peculiar relationship to the condemnee and his business."<sup>268</sup> The Georgia courts adopted the rule as "a highly practical assumption" that simply states, as a matter of law, that business losses can only be attributed to the taking where the property had some unique quality that benefitted the business.<sup>269</sup> According to the Georgia Supreme Court, "unique property is simply property which must be valued by something other than the fair market value standard" because the property is not of the type commonly bought and sold in the open market.<sup>270</sup> Where both the property and the business are owned by one person, they are considered one property, and unless the business is totally destroyed by the taking, the partial business loss is not a separate item of damage, but rather

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<sup>265</sup> *Id.* at 739, 146 S.E.2d at 891.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 738, 739, 146 S.E.2d at 890, 891.

<sup>268</sup> *Metropolitan Atlanta Rapid Transit Auth. v. Ply-Marts, Inc.*, 144 Ga. App. 482, 483-84, 241 S.E.2d 599, 601 (1978) (citing *Department of Transp. v. Dent*, 142 Ga. App. 94, 235 S.E.2d 610 (1977); *City of Gainesville v. Chambers*, 118 Ga. App. 25, 162 S.E.2d 460 (1968)).

<sup>269</sup> *Id.*

<sup>270</sup> *Housing Auth. v. Southern Ry.*, 245 Ga. 229, 230, 264 S.E.2d 174, 175 (1980). Market value is typically determined by one of three methods: replacement cost less depreciation, income, or comparable sales. *Id.* (citation omitted). The value of "unique" property is measured by a variety of other methods, such as the cost and income methods. *Id.* (citation omitted).

goes to the diminution in the value of the property.<sup>271</sup> But where the business interest is separate from the property interest, as in a lease, damage or destruction to the business interest is a separate item of recovery.<sup>272</sup>

The courts appear to be fairly liberal in allowing proof of uniqueness. For example, a condemnee who showed that he had leased one of the choicest locations for a liquor store within the county, and that he had lost business as a result of the forced relocation, was allowed to recover business losses as a separate item of recovery,<sup>273</sup> as was a condemnee who owned and operated an auto body repair shop.<sup>274</sup> In any event, uniqueness of the property is a question for the jury.<sup>275</sup> Only the "slightest evidence" is necessary to support its determination.<sup>276</sup> The business operator need not show that the business had been profitable before the taking to recover for loss of business,<sup>277</sup> but the operator is under a duty to mitigate his or her business losses.<sup>278</sup>

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<sup>271</sup> Department of Transp. v. Kendricks, 148 Ga. App. 242, 245-46, 250 S.E.2d 854, 857 (1973) (citation omitted).

<sup>272</sup> *Id.* at 245-46, 250 S.E.2d at 857-58. The Georgia Supreme Court clarified the rule in partial taking cases in 1980. In Department of Transp. v. Dixie Highway Bottle Shop, Inc., 245 Ga. 314, 265 S.E.2d 10 (1980), the court reconciled two seemingly conflicting opinions of the court of appeals, Department of Transp. v. Dent, 142 Ga. App. 994, 235 S.E.2d 610 (1977), and Department of Transp. v. Kendricks, 148 Ga. App. 242, 250 S.E.2d 854 (1973), by drawing a distinction between owners and lessees of property in partial takings:

When the business belongs to the landowner, total destruction of the business at the location must be proven before business losses may be recovered as a separate element of compensation. On the other hand, when the business belongs to a separate lessee, the lessee may recover for business losses as an element of compensation separate from the value of the land, whether the destruction of his business is total or merely partial, provided only that the loss is not remote or speculative. In either event, business losses are recoverable as a separate item only if the property is "unique."

*Dixie Highway Bottle Shop*, 245 Ga. at 314-15, 265 S.E.2d at 10 (citations omitted).

<sup>273</sup> Kessler v. Department of Transp., 142 Ga. App. 170, 170, 235 S.E.2d 636, 637 (1977).

<sup>274</sup> Cobb County v. Crain, 172 Ga. App. 594, 595, 323 S.E.2d 890, 891 (1984).

<sup>275</sup> Department of Transp. v. Dixie Highway Bottle Shop, Inc., 245 Ga. 314, 315, 265 S.E.2d 10, 11 (1980) (citation omitted).

<sup>276</sup> See Department of Transp. v. 19.646 Acres of Land, 178 Ga. App. 287, 287, 342 S.E.2d 760, 761 (1986) (quoting Department of Transp. v. 2.734 Acres of Land, 168 Ga. App. 541, 542, 309 S.E.2d 816, 818 (1983)).

<sup>277</sup> Department of Transp. v. Hillside Motors, Inc., 192 Ga. App. 637, 642, 385 S.E.2d 746, 751 (1989).

<sup>278</sup> Metropolitan Atlanta Rapid Transit Auth. v. Ply-Marts, Inc., 144 Ga. App. 482, 484-85, 241 S.E.2d 600, 602 (citing Garber v. Housing Auth., 123 Ga. App. 29, 179 S.E.2d 300 (1970)).



The Georgia courts based their determination that business losses are compensable upon a broad interpretation of "property" under the Georgia constitution.<sup>279</sup> In so doing, they simply adopted the broad definition of "property" that has evolved over the last century. The restrictions that they have placed upon recovery generally are not overly onerous. Although the requirement that the business have been profitable ignores the economic values inherent in nonprofitable businesses,<sup>280</sup> the requirement that the business owner mitigate his or her losses is certainly a reasonable one. Moreover, although the courts could have applied the "uniqueness" requirement in burdensome ways calculated to deprive owners of recovery, they do not appear to have done so in practice. Rather, it appears that recovery is available wherever a lessee can show, after a good-faith effort to mitigate, that the taking will result in an undeniable loss of profits. The requirement that the property owner show an actual destruction of business is more troublesome, however, because it ignores the losses suffered by a business owner when the value of his or her business is diminished or damaged.

## 2. Minnesota

The Minnesota Supreme Court had an opportunity to reexamine the business losses rule in 1969, in *State v. Saugen*.<sup>281</sup> The state condemned the property upon which the appellants had operated a liquor lounge. The stipulated value of the land, building, and fixtures was \$39,500; the stipulated value of the business operated on the premises was \$17,500.<sup>282</sup> The appellants tried to transfer their liquor license to a new location several times, but were unable to do so because of the state licensing laws.<sup>283</sup> The issue presented to the court was whether, under the state constitution,<sup>284</sup> the appellants could recover for the going-concern value of the lounge.<sup>285</sup>

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<sup>279</sup> It is interesting to note that the "or damaged" provision of the constitution seemed to play no part in the decision to expand the scope of recoverable damages.

<sup>280</sup> See *supra* note 18 (noting that goodwill can exist even where a business is not profitable).

<sup>281</sup> 283 Minn. 402, 169 N.W.2d 37 (1969).

<sup>282</sup> *Id.* at 403, 169 N.W.2d at 39.

<sup>283</sup> *Id.*

<sup>284</sup> The Minnesota constitution states that "[p]rivate property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured." MINN. CONST. art. I, § 13.

<sup>285</sup> *Saugen*, 283 Minn. at 403-04, 169 N.W.2d at 39.

The *Saugen* court stated that the mere *intangible* nature of going-concern value did not preclude compensation for its taking.<sup>286</sup> The court acknowledged the general rule that loss of going-concern value was not recoverable in condemnation actions,<sup>287</sup> but it noted that other courts had created exceptions to this general rule, allowing recovery of incidental damages where the government expropriated a public utility intending to continue furnishing the services,<sup>288</sup> or where the government intended a temporary taking.<sup>289</sup>

The *Saugen* court believed that an exception was also warranted "where, as here, the condemnee's business is one which cannot be pursued without a license, and where that license, while transferable between persons, must relate specifically to particular premises which are designated in the license itself."<sup>290</sup> The exception to the general rule of nonrecovery for going-concern value, however, was narrowly drawn. The court emphasized that the amount of the loss was not "speculative," but rather had been stipulated by the parties. Furthermore, the loss had actually occurred,<sup>291</sup> rather than there being a "remote possibility that the owner [would] be unable to find a wholly suitable location for the transfer of going-concern value."<sup>292</sup> The appellant made three attempts to transfer its liquor license to a new location,<sup>293</sup> but was unable to do so because of the "restricted liquor patrol limits and other peculiarities of the Minneapolis licensing situation."<sup>294</sup> Thus, over the objections of two

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<sup>286</sup> *Id.* at 404, 169 N.W.2d at 39. Moreover, "though the right vested in the owners [of a liquor license] is created through a revocable license, so long as the right exists it cannot be taken away without just compensation." *Id.* at 407-08, 169 N.W.2d at 41. The court noted that:

While it is true that liquor businesses are appropriately subject to more scrutiny and control than most businesses when the government is acting pursuant to its police power, they have the same rights as any other businesses when the government is not acting pursuant to such police power, but rather in the exercise of eminent domain.

*Id.* at 409, 169 N.W.2d at 42.

<sup>287</sup> *Id.* at 409-10, 169 N.W.2d at 42 (citing *United States v. General Motors Corp.*, 323 U.S. 373 (1945); *Mitchell v. United States*, 267 U.S. 341 (1925); 2 NICHOLS, *supra* note 14, § 5.76)).

<sup>288</sup> *Id.* at 411, 169 N.W.2d at 43 (citing *City of Omaha v. Omaha Water Co.*, 218 U.S. 180 (1910); 2 NICHOLS, *supra* note 14, § 5.76)).

<sup>289</sup> *Id.* (citing *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *Eyherabide v. United States*, 345 F.2d 565 (Ct. Cl. 1965)).

<sup>290</sup> *Id.* at 410, 169 N.W.2d at 43 (citations omitted).

<sup>291</sup> *Id.* at 412, 169 N.W.2d at 44.

<sup>292</sup> *Id.* (quoting *Kimball Laundry*, 338 U.S. at 15).

<sup>293</sup> *Id.* at 409, 169 N.W.2d at 42.

<sup>294</sup> *Id.* at 415, 169 N.W.2d at 46.

dissenters, who believed that the recovery of going-concern value should be a legislative, rather than judicial, determination,<sup>295</sup> the *Saugen* court created a very limited exception to the general rule that business losses are not compensable.

The majority was aided in its decision by the broad language of the state constitution, which provides that "[p]rivate property shall not be *taken, destroyed or damaged* for public use,"<sup>296</sup> and by a supporting statute, which specifically provides: "The word 'taking' and all words and phrases of like import include every interference, under the right of eminent domain, with the ownership, possession, enjoyment, or value of private property."<sup>297</sup> Thus, the Minnesota statute explicitly rejects the notion that "taking" meaning "taking over," as in *Mitchell*.<sup>298</sup> The *Saugen* court noted that here the state admitted that it had not considered the value of the business in setting the award,<sup>299</sup> and that the licensing law, rather than merely peculiar factual circumstances as in *Mitchell*,<sup>300</sup> prevented the condemnee from relocating.

The Minnesota Supreme Court has declined on two occasions to expand the narrow holding of *Saugen*. In *City of Minneapolis v. Schutt*,<sup>301</sup> the appellant leased a parking ramp, twenty percent of which was condemned. The owner was compensated for the loss of the fee, but the appellant's claim for loss of going-concern value was denied.<sup>302</sup> The court refused to extend the *Saugen* rule, stating that the appellant's interest was not as well-defined as the interest in the liquor license in *Saugen*.<sup>303</sup> Moreover, because the parties in *Schutt* had not stipulated to the amount of damages for the loss of going-concern value, as had the parties in *Saugen*, the court was

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<sup>295</sup> *Id.* at 416-18, 169 N.W.2d at 46-47 (Peterson, J., dissenting); *id.* at 418, 169 N.W.2d at 47 (Rogosheske, J., dissenting).

<sup>296</sup> MINN. CONST. art. I, § 13 (emphasis added).

<sup>297</sup> *Saugen*, 283 Minn. at 404, 169 N.W.2d at 39 (quoting MINN. STAT. § 117.02(2), current version at MINN. STAT. § 117.025(2) (1987)). The *Saugen* court stated: "The state unequivocally stipulated that 'absent the taking by the state in these proceedings, there is no evidence that the condemnee could not have continued to operate its lounge at the premises in question.'" *Id.* at 414, 169 N.W.2d at 45.

<sup>298</sup> 267 U.S. 341 (1925). See *supra* notes 110 & 111 and accompanying text for a discussion of *Mitchell*.

<sup>299</sup> *Saugen*, 283 Minn. at 412-15, 169 N.W.2d at 44-46.

<sup>300</sup> *Id.*

<sup>301</sup> 256 N.W.2d 260, 261 (Minn. 1977).

<sup>302</sup> Appellant also sought recovery of loss of "efficiency value" caused by loss of space and competition from the new municipal ramp that was being constructed. *Id.* The court rejected this claim, because all business owners bear the risk of new competition. *Id.* at 265.

<sup>303</sup> *Id.* at 263.

concerned that the damages might be speculative.<sup>304</sup> In addition, the appellant's business was not totally destroyed; the parking ramp could continue to operate as a going concern, albeit with reduced profitability.<sup>305</sup> The *Schutt* court clarified the rule on loss of going-concern value by stating that compensation was available where the condemnee could show: "(1) that his going-concern value will in fact be destroyed as a direct result of the condemnation, and (2) that his business either cannot be relocated as a practical matter, or that relocation would result in irreparable harm to the interest."<sup>306</sup> Thus, the appellant in *Schutt* was entitled to no compensation, despite the resultant "inequities."<sup>307</sup>

In its most recent pronouncement on the subject, *Housing & Redevelopment Authority v. Naegele Outdoor Advertising Co.*,<sup>308</sup> the court held that a condemnee that had not shown that it would be unable to transfer its liquor license to another location could not recover for the going-concern value of its on-sale liquor business. The *Naegele* court distinguished *Saugen* on the grounds that in *Saugen* the parties had stipulated that the appellant went out of business because it was unable to transfer its liquor license to a new location.<sup>309</sup> In addition, the *Naegele* court specifically stated that the two-pronged test of *Schutt* applied to condemnation of liquor establishments, further restricting the potential scope of *Saugen*.<sup>310</sup>

Although the court has yet to address the issue, it appears that the Minnesota Supreme Court intends going-concern value to be interpreted broadly as including a number of business interests.<sup>311</sup> The court's concern in *Schutt* that the parties had not stipulated to the amount of lost going-concern value is disturbing, because it suggests that such damages will be considered too speculative to permit recovery absent such a stipulation. One can well imagine the potential for abuse if condemnors could avoid payment of going-concern value by simply refusing to stipulate to amounts. Moreover, although the court's insistence that the condemnee show an inability

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<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *Id.* at 265.

<sup>307</sup> *Id.*

<sup>308</sup> 282 N.W.2d 537, 540 (Minn. 1979).

<sup>309</sup> *Id.* at 539-40.

<sup>310</sup> *Id.*

<sup>311</sup> See, e.g., *Schutt*, 256 N.W.2d at 262 n.2 (noting "that courts have generally failed to distinguish between such terms as 'good will,' 'going concern,' 'efficiency value,' and 'going-business,'" and adopting the term "going-concern" to cover all of appellant's business damages claims).

to relocate can be seen as a valid mitigation requirement, its concern that the going-concern value be actually destroyed ignores the very real losses that a diminution in going-concern value may inflict.

### 3. Michigan

Michigan also allows limited recovery of business losses. The rationale expressed in the Michigan cases is similar to that espoused in the Minnesota ones, although in Michigan the modern business losses rule has evolved primarily in the courts of appeals, rather than in the supreme court.

Under Michigan law, just compensation requires placing the property owner "in as good a position as was occupied before the taking."<sup>312</sup> The courts have not interpreted this language as meaning that even consequential and incidental damages are recoverable.<sup>313</sup> Specifically, the general rule in Michigan is that the goodwill or going-concern value of a business operated on condemned realty is recoverable only if the business is taken for use as a going concern.<sup>314</sup> The rationale is that generally a business can be relocated; therefore, if the government does not take the business for use as a going concern, it has not taken anything from the owner, and no compensation is required, at least not for any loss of business value.<sup>315</sup>

As early as 1888, the Michigan Supreme Court recognized that some exceptions should apply to this general rule. In *Grand Rapids & Indiana Railroad v. Weiden*,<sup>316</sup> the supreme court suggested that business losses are compensable where a taking destroys a business

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<sup>312</sup> *City of Detroit v. Michael's Prescriptions*, 143 Mich. App. 808, 811, 373 N.W.2d 219, 220-21 (1985) (citing *State Highway Comm'r v. Eilender*, 362 Mich. 697, 699, 108 N.W.2d 755, 756 (1961); *In re Grand Haven Highway*, 357 Mich. 20, 28, 97 N.W.2d 748, 752 (1959); *In re Widening of Bagley Ave.*, 248 Mich. 1, 5, 226 N.W. 688, 689 (1929)). MICH. CONST. art. 10, § 2 provides, in relevant part: "Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law."

<sup>313</sup> Some courts have interpreted such language differently. See *infra* note 431 and accompanying text for a discussion of how Louisiana courts interpret similar language to allow recovery of consequential and incidental damages.

<sup>314</sup> See *In re Edward J. Jeffries Homes Hous. Project*, 306 Mich. 638, 651, 11 N.W.2d 272, 276 (1943) (citing *Banner Milling Co. v. State*, 240 N.Y. 533, 148 N.E. 668, *cert. denied*, 269 U.S. 582 (1925)); *In re City of Lansing v. Wery*, 68 Mich. App. 158, 163, 242 N.W.2d 51, 54 (1976).

<sup>315</sup> *Michael's Prescriptions*, 143 Mich. App. at 811-12, 373 N.W.2d at 221 (citing *Community Redev. Agency v. Abrams*, 15 Cal. 3d 813, 543 P.2d 905, 126 Cal. Rptr. 473 (1975), *cert. denied*, 429 U.S. 869 (1976)).

<sup>316</sup> 70 Mich. 390, 38 N.W. 294 (1888).

because it is unable to find a suitable site for relocation.<sup>317</sup> Over the next eighty years, however, the Michigan courts restricted the *Weiden* holding, establishing that losses of goodwill or going-concern value were not generally compensable, but rather were available only where the taking of the land destroyed the business altogether because of the lack of other suitable locations.<sup>318</sup>

The Michigan Court of Appeals set forth the progenitor of the modern rule in *State Highway Commission v. L & L Concession Co.*<sup>319</sup> in 1971. L & L Concession had an exclusive right under a lease to operate a grandstand food and souvenir concession at a race track for a specified period of time.<sup>320</sup> The entire race track was con-

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<sup>317</sup> The *Weiden* court noted:

Both of the appellants were using their property in lucrative business, in which the locality and its surrounding had some bearing on its value. Apart from the money value of the property itself, they were entitled to be compensated so as to lose nothing by the interruption of their business and its damage by the change. A business stand is of some value to the owner of the business, whether he owns the fee of the land or not, and a diminution of business facilities may lead to serious results. *There may be cases when the loss of a particular location may destroy business altogether, for want of access to any other that is suitable for it. Whatever damage is suffered, must be compensated.* Appellants are not legally bound to suffer for petitioner's benefit. Petitioner can only be authorized to oust them from their possessions by making up to them the whole of their losses.

*Id.* at 395, 38 N.W. at 295-96 (emphasis added).

Fifty years later, the Michigan Supreme Court also stated that: "An established trade or business connected with a location clearly enhances the value of a leasehold interest, and just compensation contemplates this fact." *In re Widening of Michigan Ave.*, 280 Mich. 539, 550, 273 N.W. 798, 803 (1937) (quoting with approval *Des Moines Wet Wash Laundry v. City of Des Moines*, 197 Iowa 1082, 1090, 198 N.W. 486, 490 (1924)).

<sup>318</sup> In post-*Weiden* cases:

the Court has said that damages may not be recovered, on the authority of *Weiden*, for "loss of profits" due to interruption of business and that in the case of "interruption of business" the recovery will be limited to the amount of the "expenses" attributable to the interruption. Such statements cannot properly be read as precluding recovery of damages in the kind of case alluded to in the *Weiden* opinion, where the "loss of a particular location may destroy business altogether, for want of access to any other that is suitable for it."

*State Highway Comm'n v. L & L Concession Co.*, 31 Mich. App. 222, 236 n.17, 187 N.W.2d 465, 472 n.17 (1971) (emphasis in *L & L Concession Co.*) (citing *In re Grand Haven Highway*, 357 Mich. 20, 31, 97 N.W.2d 748, 753 (1959)). *In re Edward J. Jeffries Homes Hous. Project*, 306 Mich. 638, 651, 11 N.W.2d 272, 276 (1943), seems to be inconsistent with *Weiden*: "The loss of good will is not an element of compensation where the business is not taken for use as a going concern." (citations omitted). *Jeffries* did not overrule *Weiden*, however, and the facts suggest that the condemnee, a plumber, had a very weak claim. As the court stated, the evidence did not show the plumber's business could not be relocated. *Jeffries*, 306 Mich. at 651, 11 N.W.2d at 276.

<sup>319</sup> 31 Mich. App. 222, 187 N.W.2d 465 (1971).

<sup>320</sup> *Id.* at 225, 187 N.W.2d at 466.

demned. L & L Concession argued that its business had a saleable value which, because of the monopoly position it enjoyed at the track, could not be transferred to another location.<sup>321</sup>

The court of appeals, relying on *Kimball*<sup>322</sup> and *Saugen*,<sup>323</sup> found that L & L Concession was entitled to compensation because the going-concern value of its business was related to its "locational advantage" and "monopoly position" at the race track, rather than "conventional customer goodwill."<sup>324</sup> The court concluded that these factors made the case more analogous to cases in which the condemned property could not be valued separately from the business conducted thereon than to typical cases seeking going-concern value.<sup>325</sup> *L & L Concession Co.* thus established that recovery of going-concern value was possible, at least under some circumstances.

Two subsequent cases, *City of Detroit v. Whalings, Inc.*<sup>326</sup> and *City of Lansing v. Wery*,<sup>327</sup> further elucidated the rule regarding recovery of going-concern value. The condemnee in *Whalings* had operated a men's clothing store on Woodward Avenue in Detroit for over 100 years.<sup>328</sup> When the building it leased was condemned, Whalings sought to show that no other site was available in downtown Detroit to which it could relocate. The business thus made a claim for loss of goodwill.<sup>329</sup>

The court of appeals rejected Whalings's claim, distinguishing *L & L Concession Co.* on its facts. First, the court noted that, unlike

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<sup>321</sup> *Id.* at 232-33, 187 N.W.2d at 470.

<sup>322</sup> See *supra* notes 148-72 and accompanying text for a discussion of *Kimball*.

<sup>323</sup> See *supra* notes 281-300 and accompanying text for a discussion of *Saugen*.

<sup>324</sup> The court of appeals noted:

The going-concern value of L & L's business is not related to customers L & L cultivated but to the patronage of the race track; the concession gives L & L a monopoly on food and souvenir sales at the Speedrome. The value of the concession flows from locational advantage and L & L's monopoly position at that location, not conventional customer goodwill. The value flows from an "adaptation" of the grandstand to a use for which it is suited. Viewed from that perspective, allowing compensation for the value of the concession is consistent with the case law which recognizes that in valuing real estate for condemnation purposes it is proper to include value attributable to a use for which the real estate is adapted.

*L & L Concession Co.*, 31 Mich. App. at 232-33, 187 N.W.2d at 470 (footnote omitted).

<sup>325</sup> Specifically, the court stated: "In a large number of cases owners and lessees have recovered going-concern value where the condemned property could not be realistically valued apart from the business there conducted, or, as it is sometimes said, the business for which the property is best 'adapted.'" *Id.* (footnote omitted).

<sup>326</sup> 43 Mich. App. 1, 202 N.W.2d 816 (1972).

<sup>327</sup> 68 Mich. App. 158, 242 N.W.2d 51 (1976).

<sup>328</sup> *Whalings*, 43 Mich. App. at 2, 202 N.W.2d at 817.

<sup>329</sup> *Id.* at 3, 202 N.W.2d at 817.

L & L Concession, Whalings did not enjoy a monopoly position and its customers were not a "captive audience."<sup>330</sup> Whalings's going-concern value therefore was not based primarily upon its location, as was L & L Concession's.<sup>331</sup>

Second, in *L & L Concession Co.*, no suitable alternative location was available because the concession stand would have had to relocate within the race track, but the entire race track had been condemned. The *Whalings* court noted that "if Whalings [was] unable to relocate, that inability [was] caused by the fact that all suitable locations [were] occupied by other businesses, not because all suitable locations [had] been condemned."<sup>332</sup> Thus, "the possibility of finding a suitable location nearby with the same or nearly the same convenience factors is not foreclosed by reason of the condemnation herein."<sup>333</sup> Although the court admitted that the effect on Whalings might be the same,<sup>334</sup> it determined that the distinction nonetheless had an important effect on proof of damages. Where all suitable locations have been condemned, proof of destruction of a business dependent on location is certain. Where the business is unable to relocate because other businesses have preempted all suitable relocation sites, the business owner would have to show that none of them would move or go out of business before the owner could show total destruction of his or her business.<sup>335</sup> The court determined that although Whalings should be compensated for its relocation expenses, it was unrealistic to grant the business owner loss of goodwill as well.<sup>336</sup>

*Wery* affirmed the limitations enunciated in *Whalings*, but held, under the facts presented, that recovery of goodwill was justified.<sup>337</sup> The owner in *Wery* had leased premises on which it had operated a restaurant shop since 1924. The trial court found that the restaurant was "a unique hamburger shop" and a "downtown institution," which enjoyed close proximity to the state capitol, the Lansing commercial center, and Lansing Community College.<sup>338</sup>

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<sup>330</sup> *Id.* at 9, 202 N.W.2d at 820.

<sup>331</sup> *Id.*

<sup>332</sup> *Id.* at 10, 202 N.W.2d at 821.

<sup>333</sup> *Id.* at 10, 202 N.W.2d at 820; see also *State Highway Comm'n v. Gaffield*, 108 Mich. App. 88, 94-95, 310 N.W.2d 281, 284 (1981) (no recovery allowed for going-concern value of residential property occasionally used in photography business).

<sup>334</sup> *Whalings*, 43 Mich. App. at 10, 202 N.W.2d at 821.

<sup>335</sup> *Id.*

<sup>336</sup> *Id.* at 11, 202 N.W.2d at 821.

<sup>337</sup> See *City of Lansing v. Wery*, 68 Mich. App. 158, 164-65, 242 N.W.2d 51, 54 (1976).

<sup>338</sup> *Id.* at 160, 242 N.W.2d at 52 (quoting trial court's opinion).



Although the restaurant owner made several attempts to relocate after his leased premises were condemned, he was unable to find a location even "remotely comparable" to the one he had lost.<sup>339</sup> Thus, the restaurant "was a unique operation in a unique location. It depended greatly on that location, and any significant move would so greatly impair its business as to nearly destroy it."<sup>340</sup> More importantly, "[t]he premises were adapted for a particularly highly productive use *no way dependent on ownership by these particular defendants.*"<sup>341</sup> Under such circumstances, the court of appeals concluded, compensation for going-concern value was warranted.<sup>342</sup>

The most recent statement of the business losses rule by the Michigan Court of Appeals came in 1985, in *City of Detroit v. Michael's Prescriptions*.<sup>343</sup> In holding that a pharmacist was entitled to going-concern value where an extensive redevelopment project<sup>344</sup> had eliminated an entire residential and business community and had deprived the condemnee of his unique locational monopoly,<sup>345</sup> the court offered the most comprehensive summary of the business losses rule in Michigan to date:

[R]ecovery of the going concern value of a business lost to condemnation will depend on the transferability of that business to another location. If the business can be transferred, nothing is taken and compensation is therefore not required. Whether a business is transferable will be decided on a case by case basis inasmuch as a specific factual analysis is required. Generally, however, recovery will be allowed where the business derives its success from a location not easily duplicated or where relocation is foreclosed for reasons relating to the entire condemnation project.<sup>346</sup>

If the business, then, is *not* transferable, the business owner may recover for loss of going-concern value. If the business is transferable, the business owner may not recover for any loss of going-

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<sup>339</sup> *Id.* at 165, 242 N.W.2d at 55.

<sup>340</sup> *Id.*

<sup>341</sup> *Id.* (quoting trial court's opinion) (emphasis in trial court's opinion).

<sup>342</sup> *Id.*

<sup>343</sup> 143 Mich. App. 808, 373 N.W.2d 219 (1985).

<sup>344</sup> See *supra* notes 6 & 7 for a discussion of the Poletown Project.

<sup>345</sup> *Michael's Prescriptions*, 143 Mich. App. at 820-21, 373 N.W.2d at 225. The pharmacy, which had operated in the neighborhood for over 40 years, was located directly across from a hospital, was in a building occupied by two doctors, and generated "phenomenal" gross sales. *Id.* at 820, 373 N.W.2d at 225.

<sup>346</sup> *Id.* at 819, 373 N.W.2d at 224-25 (footnote omitted).

concern value, although certain business interruption expenses may be allowed.<sup>347</sup>

Michigan thus affords fairly generous recovery of business losses. The Michigan courts have recognized that large-scale condemnation projects that destroy or disrupt entire neighborhoods can effectively bar businesses, particularly smaller ones, from relocating. The loss or scattering of the client base strikes a blow so hard to the business that it often cannot recover.

#### 4. Wisconsin

In 1970, the Wisconsin Supreme Court handed down its decision in *Luber v. Milwaukee County*.<sup>348</sup> Commentators hailed this opinion as "a landmark decision,"<sup>349</sup> and predicted that it would have a "profound influence"<sup>350</sup> on recovery of incidental losses under Wisconsin law. The dearth of case law on this topic since *Luber*, and an anomalous recent opinion of the Wisconsin Court of Appeals,<sup>351</sup> however, make uncertain the current status of the business losses rule in Wisconsin.

*Luber* was actually a condemnation blight case, although the court's sweeping language suggests that it was to have broader application. The condemnees, the Lubers, owned a building, two-thirds of which was leased to a retail furniture business.<sup>352</sup> The remaining one-third had been leased since 1944 to a company that bottled and sold at wholesale liquor products. When its lease expired in July 1964, the liquor company decided not to renew, because it had learned that the Expressway Commission intended to condemn

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<sup>347</sup> See *In re Grand Haven Highway*, 357 Mich. 20, 31-32, 97 N.W.2d 748, 754 (1959); *In re Park Site*, 247 Mich. 1, 3, 225 N.W. 498, 498 (1929); *City of Detroit v. Hamtramck Community Fed. Credit Union*, 146 Mich. App. 155, 158, 379 N.W.2d 405, 406 (1985) ("[D]amages resulting from business interruption are compensable in condemnation cases provided the damages can be proven with a reasonable degree of certainty.") (citing *Grand Rapids & I.R.R. v. Weiden*, 70 Mich. 390, 38 N.W. 294 (1888); see also *Michael's Prescriptions*, 143 Mich. App. at 819 n.2, 373 N.W.2d at 224 n.2 ("It should be clear that recovery for business interruption damages and recovery for going concern value are mutually exclusive since one assumes the continuation of the business and the other assumes its loss.")).

<sup>348</sup> 47 Wis. 2d 271, 177 N.W.2d 380 (1970).

<sup>349</sup> 4 NICHOLS, *supra* note 14, § 12B.17[6], at p. 12B-248.

<sup>350</sup> Note, *Eminent Domain—Compensation for Lost Rents*, 1971 Wis. L. Rev. 657, 662; see also 4 NICHOLS, *supra* note 14, § 12B.17[6], at p. 12B-251 ("Although it dealt specifically with the recovery of lost rentals and expenses caused by condemnation blight, it has implications regarding lost profits, goodwill, [and] moving expenses . . .").

<sup>351</sup> *Hasselblad v. City of Green Bay*, 145 Wis. 2d 439, 427 N.W.2d 140 (Wis. Ct. App. 1988). See *infra* notes 366-71 and accompanying text for a discussion of *Hasselblad*.

<sup>352</sup> *Luber*, 47 Wis. 2d at 272-73, 177 N.W.2d at 381.

the property. The Lubers tried unsuccessfully to obtain a new tenant, but the space sat empty until the building was actually taken by the Commission in February 1967. The Lubers requested compensation of \$350 a month for thirty-two months as rental loss, or a total of \$11,200—the amount of rent the liquor company would have paid had it renewed its lease.<sup>353</sup>

The Expressway Commission, however, offered only \$2,100 as rental loss. Its offer was based upon a Wisconsin statute that set a twelve-month limit on rental losses caused by a condemnation.<sup>354</sup> The Lubers filed suit, contending that the statutory rental loss provision was an arbitrary and unreasonable limitation on the right of recovery granted by the Wisconsin constitution.<sup>355</sup> In a four to three decision, the Supreme Court of Wisconsin agreed.

The *Luber* court acknowledged that, under the general rule in the United States, such damages are *damnum absque injuria*, but it also noted that this rule was slowly being eroded by courts and legislatures.<sup>356</sup> The court had no difficulty in finding that a landowner's interest in rental income is a compensable property right under the state constitution,<sup>357</sup> noting that the test for determining damages is not what the government has gained, but rather what the owner has lost.<sup>358</sup> The court further noted that because rental loss implicates a valid property interest, payment for such loss is constitutionally required. The state statute providing for restricted compensation thus operated not as "a matter of legislative charity but [as] an unauthorized limit upon recovery."<sup>359</sup> The court therefore explicitly renounced the rule making such damages *damnum*

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<sup>353</sup> *Id.* at 273, 177 N.W.2d at 381.

<sup>354</sup> WIS. STAT. § 32.19(4) (1965). This section provided:

(4) Net rental loss. Net rental losses resulting from vacancies during the year preceding the taking of the property, provided that: 1) such loss is limited to the amount that exceeds the average annual rental losses caused by vacancies during the first 4 years of the 5-year period immediately preceding the taking; and 2) such rental loss was caused by the proposed public land acquisition.

*Id.* (quoted in *Luber*, 47 Wis. 2d at 275 n.1, 177 N.W.2d at 382 n.1). This section was revised by 1971 WIS. LAWS ch. 103, §§ 1–4, to eliminate any time restriction on losses. *See* WIS. STAT. ANN. § 32.19(4)(c)(6) (West 1971) (current version at WIS. STAT. ANN. § 32.195(6) (West 1989)).

<sup>355</sup> *Luber*, 47 Wis. 2d at 275, 177 N.W.2d at 382.

<sup>356</sup> *Id.* at 278, 280, 282, 177 N.W.2d at 384, 385, 386. The changing face of the American landscape means that takings today increasingly result in large incidental losses, which wreak far more havoc on property owners than was true in the past. *See* 177 N.W.2d at 384–85.

<sup>357</sup> *See id.* at 279, 177 N.W.2d at 384.

<sup>358</sup> *Id.* (citing *Volbrecht v. State Highway Comm'n*, 31 Wis. 2d 640, 647, 143 N.W.2d 429, 432 (1966)).

<sup>359</sup> *Id.* at 280, 177 N.W.2d at 385.

*absque injuria*, and invalidated the statute insofar as it limited compensation.<sup>360</sup>

The three dissenting judges based their argument on the wording of the Wisconsin constitution, which provides only for compensation for property "taken."<sup>361</sup> In the dissent's view, "[t]he majority, by equating loss of rent with a taking, are construing the constitutional provision as if it read: The property of no person shall be taken *or damaged* for public use without just compensation therefor"—a development they regarded as an "unfortunate" and "impermissible" judicial extension of the constitution.<sup>362</sup> The majority had noted that many states had amended their constitutions to provide recovery for "damage" to property, but apparently believed that the distinction between the presence or absence of the term was a minor one.<sup>363</sup>

In 1971, the Wisconsin legislature redrafted the statutory provision at issue in *Luber*, eliminating the unconstitutional language.<sup>364</sup> Since that time, the supreme court has had little occasion to reexamine *Luber*.<sup>365</sup> However, a recent Wisconsin court of appeals decision, *Hasselblad v. City of Green Bay*,<sup>366</sup> casts a threatening shadow on *Luber*.

The condemnees in *Hasselblad* had incurred \$126,000 in expenses in replacing their business after a condemnation action by

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<sup>360</sup> *Id.* at 283, 177 N.W.2d at 386.

<sup>361</sup> Wis. CONST. art. 1, § 13, provides: "The property of no person shall be taken for public use without just compensation therefor."

<sup>362</sup> *Luber*, 47 Wis. 2d at 285, 177 N.W.2d at 387 (Wilkie, J., dissenting). It is interesting to note that at least two states whose constitutions do have an "or damaged" clause have rejected the *Luber* approach. See *Chicago Hous. Auth. v. Lamar*, 21 Ill. 2d 362, 365-68, 172 N.E.2d 790, 792-93 (1961); *Uvodich v. Arizona Bd. of Regents*, 9 Ariz. App. 400, 405-06, 453 P.2d 229, 234-35 (1969).

<sup>363</sup> See *Luber*, 47 Wis. 2d at 280, 177 N.W.2d at 385. The court stated these amendments were undertaken to "avoid difficulties" with the issue of whether such compensation was a matter of constitutional requirement or legislative grace. *Id.*

<sup>364</sup> 1971 Wis. Laws ch. 103, §§ 1-4.

<sup>365</sup> In *Rotter v. Milwaukee County Expressway & Transportation Commission*, the court addressed the right of a business to recover for duplicate rental expenses, rental loss, and moving expenses incurred when it had to relocate because of a condemnation. 72 Wis. 2d 553, 556, 558, 560, 241 N.W.2d 440, 442, 443, 444 (1976). The court rejected the business's claim on procedural grounds, stating that *Luber* "did not create a new category of 'incidental' or 'consequential' damages which could be brought directly to court without regard to the statutory procedure as to claims and without meeting the requirement of filing a claim with the commission or public body involved in a taking before going to court." *Id.* at 562, 241 N.W.2d at 445. The *Rotter* court thus held that constitutional challenges to limits on recovery of incidental losses must be raised first before the condemning authority. *Id.* at 564, 241 N.W.2d at 446.

<sup>366</sup> 145 Wis. 2d 439, 427 N.W.2d 140 (Wis. Ct. App. 1988).

the City of Green Bay.<sup>367</sup> The city offered \$50,000, the maximum amount allowed for replacement costs under statute.<sup>368</sup> The *Hasselblad* court construed *Luber* very narrowly in denying the condemnees the additional recovery they sought. The court indicated that because *Luber* was a four to three decision and represented a "radical departure" from the prevailing rule on incidental or consequential damages, it should be limited to its factual setting, absent direction otherwise from the Wisconsin Supreme Court.<sup>369</sup> The *Hasselblad* court also determined that replacement costs were similar to moving costs which, in its view, lacked the direct relationship to fair market value that the rental losses in *Luber* had.<sup>370</sup> Yet the court ignored the *Luber* court's endorsement of a Florida case holding that full or just compensation did require recovery of moving expenses.<sup>371</sup>

The *Hasselblad* court's crabbed reading of *Luber* seems at odds with *Luber*'s sweeping rejection of the *damnum absque injuria* rule. Because the condemnees in *Hasselblad* did not appeal to the supreme court, it is difficult to predict the effect of this decision on recovery

<sup>367</sup> *Id.* at 441, 427 N.W.2d at 141.

<sup>368</sup> *Id.*; see WIS. STAT. ANN. § 32.19(4m)(a) (West 1989).

<sup>369</sup> *Hasselblad*, 145 Wis. 2d at 442-43, 427 N.W.2d at 141-42. It is curious that the court of appeals concluded that the *Luber* court's acknowledgment that the prevailing view that incidental or consequential damages are not recoverable somehow signalled its intent that the holding in *Luber* be construed narrowly and limited to its facts. See *id.* It would seem that *Luber*'s statement that "[t]he rule making consequential damages *damnum absque injuria* is, under modern constitutional interpretation, discarded," *Luber*, 47 Wis. 2d at 283, 177 N.W.2d at 386, would, when preceded by its recognition of the majority view to the contrary, indicate instead its intent that the holding have broad application. In addition, the *Hasselblad* court's statement that *Rotter* suggests that replacement costs are not constitutionally required misconstrues the narrow holding of *Rotter*. See *Rotter*, 72 Wis. 2d at 564, 241 N.W.2d at 446.

<sup>370</sup> See *Hasselblad*, 145 Wis. 2d at 444, 427 N.W.2d at 142 (quoting *Klopping v. City of Whittier*, 8 Cal. 3d 39, 54 n.7, 500 P.2d 1345, 1357 n.7, 104 Cal. Rptr. 1, 13 n.7 (1972)).

<sup>371</sup> *Jacksonville Expressway Auth. v. Henry G. Du Pree Co.*, 108 So. 2d 289, 291, 292 (Fla. 1958).

We feel our constitutional provision for full compensation requires that the courts determine the value of the property by taking into account all facts and circumstances which bear a reasonable relationship to the loss occasioned the owner by virtue of the taking of his property under the right of eminent domain.

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Although the contention that moving costs have no bearing on the fair market value of the premises may be meritorious in other jurisdictions, it has no merit in Florida, where an owner is constitutionally guaranteed full or just compensation. The theory and spirit of such a guarantee require a practical attempt to make the owner whole. A person who is put to expense through no desire or fault of his own can only be made whole when his reasonable expenses are included in the compensation.

*Id.* at 291-92 (citations omitted) (quoted with approval in *Luber*, 47 Wis. 2d at 282, 177 N.W.2d at 386).

of business losses in Wisconsin. Wisconsin statutory law does permit generous recovery of certain incidental and consequential losses.<sup>372</sup> The provisions often contain statutory caps, however, and some types of business losses are not specifically provided for under the statute.<sup>373</sup> Thus, the extent of recovery for a business owner in Wisconsin remains uncertain.

## 5. Alaska

Of all of the state courts addressing the business losses rule to date, the Alaska Supreme Court has presented the most analytical and comprehensive reasoning for rejecting the rule. In 1976, the court first faced the issue of compensation for business losses, in *State v. Hammer*, where it held that such losses were recoverable, even where the losses were suffered by a lessee.<sup>374</sup> In *Hammer*, one of the appellees had leased the first floor of a building for use as a bar.<sup>375</sup> The state condemned the entire building, which was in the path of the proposed Petersburg Highway. Although the lessee was eventually able to reopen his bar, it took him nine months to find a new location. The issue presented to the court was a narrow one: "whether temporary loss of profits due to business interruption directly resulting from a state's taking of the land on which the business operated is a damage to property compensable under [the Alaska] constitution."<sup>376</sup>

The court examined the rationales traditionally presented for denying recovery of business losses, and found them lacking.<sup>377</sup> First, the argument that damage to personal property need not be compensated was clearly inapplicable, for Alaska law explicitly makes the loss of such property compensable.<sup>378</sup> Second, the *Ham-*

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<sup>372</sup> See, e.g., WIS. STAT. ANN. § 32.19(3)(a)-(c) (West 1989) (allowing actual or fixed moving expenses, or optional fixed payment for the business); *id.* § 32.19(4m)(a)(2) (allowing payment for increased interest and other debt service costs).

<sup>373</sup> For example, the statute makes no explicit provision for recovery of loss of profits or loss of goodwill. These losses arguably would be recoverable under *Luber*. See Note, *supra* note 350, at 662-63.

<sup>374</sup> 550 P.2d 820, 826 (Alaska 1976).

<sup>375</sup> *Hammer*, 550 P.2d at 822. The court saw no reason to distinguish between tenants and owners of real property in condemnation actions. *Id.* at 823 n.3.

<sup>376</sup> *Id.* at 823.

<sup>377</sup> *Id.* at 823-26. See *supra* notes 120-47 and accompanying text for a discussion of theories of noncompensability.

<sup>378</sup> *Hammer*, 550 P.2d at 823 & n.6 (citing ALASKA STAT. § 01.10.060 (1982) ("In the laws of the state, unless the context otherwise requires . . . 'property' includes real and personal property."); *State v. Ness*, 516 P.2d 1212, 1214 n.9 (Alaska 1973); *Stroh v. Alaska State Hous. Auth.*, 459 P.2d 480, 483 (Alaska 1968)).

mer court found the reasoning articulated by the United States Supreme Court in *Mitchell* that the condemnor takes only the land, not the business,<sup>379</sup> equally unpersuasive.<sup>380</sup> Third, the *Hammer* court rejected the theory that business losses, particularly lost profits, are too speculative and uncertain in amount to award.<sup>381</sup> The court noted that damages for loss of profits are awarded in a variety of other civil contexts,<sup>382</sup> provided the loss is supported by sufficient evidence.<sup>383</sup> If the aggrieved party can prove its damages with reasonable certainty, it can recover them; if the proof is lacking, the damages are not allowed. The court found it "incongruous that courts allow proof of loss of profits damages in most types of actions, on a case by case basis, and yet in eminent domain cases bar all such claims as inherently speculative."<sup>384</sup>

After reviewing case law from Wisconsin,<sup>385</sup> Florida,<sup>386</sup> and Georgia<sup>387</sup> rejecting the business losses rule, the *Hammer* court

<sup>379</sup> *Mitchell v. United States*, 267 U.S. 341, 346 (1925). See *supra* notes 110 & 111 and accompanying text for a discussion of *Mitchell*.

<sup>380</sup> The *Hammer* court noted:

This approach has several serious flaws. First, it conflicts with our principle of compensation, which, instead of looking at the benefit to the condemnor as a measure of compensation, looks to the loss to the owner, as measured by an objective standard . . . . Secondly, *Mitchell* . . . was decided under the fifth amendment to the United States Constitution, which unlike the Alaska Constitution, does not expressly require compensation for *damage* to property. Finally, the reasoning of *Mitchell* is unacceptable because it fails to provide a realistic measure of what has been taken. The court simply ignored, for the purposes of compensation, the destruction of *Mitchell's* business, characterizing it as "an unintended incident of the taking". This court would poorly serve the law if it were to so blind itself to the realities of condemnation.

550 P.2d at 824 (footnotes omitted) (emphasis in original). The Alaska constitution provides: "Private property shall not be taken or damaged for public use without just compensation." ALASKA CONST. art. I, § 18.

<sup>381</sup> *Hammer*, 550 P.2d at 824.

<sup>382</sup> *Id.* The court noted that damages for loss of profits have been awarded in tort actions, both personal and business, breach of contract actions, antitrust suits, and actions for infringement of patents or trademarks. *Id.*

<sup>383</sup> The court noted: "In any case seeking loss of profits, such damages must be 'reasonably certain': the trier of fact must be able to determine the amount of lost profits from evidence on the record and reasonable inferences therefrom, not from mere speculation and wishful thinking." *Id.* at 824-25 (footnote omitted).

<sup>384</sup> *Id.* at 825. Moreover, the parties in *Hammer* had stipulated the amount of profits lost, eliminating any problems of proof. *Id.*

<sup>385</sup> *Id.* at 825-26 (reviewing *Luber v. Milwaukee County*, 47 Wis. 2d 271, 177 N.W.2d 380 (1970) (discussed *supra* notes 348-63 and accompanying text)).

<sup>386</sup> *Id.* at 826 (reviewing *Jacksonville Expressway Auth. v. Henry G. Du Pree Co.*, 108 So. 2d 289 (Fla. 1958)).

<sup>387</sup> *Id.* (reviewing *Bowers v. Fulton County*, 221 Ga. 731, 146 S.E.2d 884 (1966) (discussed *supra* notes 259-67 and accompanying text)). The court also noted that Minnesota and California allow recovery of some business losses. *Id.*

turned to the Alaska constitution.<sup>388</sup> The supreme court concluded that the language of the Alaska constitution mandated recovery for temporary loss of profits.<sup>389</sup> A business is "property," the court noted, and the taking of a leasehold can directly damage that property interest.<sup>390</sup> According to the *Hammer* court, "[t]o deny compensation for such damages would contravene the policy behind the constitutional provision, that the condemnee should not pay a higher price for a public improvement than do other members of the public."<sup>391</sup> The court had little concern for the possibility that allowing such relief might strain the public coffers.<sup>392</sup>

The *Hammer* court thus held that a temporary loss of profits during relocation resulting from the taking of property on which a business was conducted was a "damaging" of property for which the Alaska constitution mandates compensation.<sup>393</sup> Interestingly, of the courts that have mandated recovery of business losses in recent years, the Alaska Supreme Court is the only one to have relied upon the presence of an "or damaged" clause in its state constitution.<sup>394</sup> Of the four other states in which business losses are judicially recognized, two—Georgia<sup>395</sup> and Minnesota<sup>396</sup>—also have state constitutions requiring that compensation be paid for the "damaging," as well as the "taking," of private property. Yet only the Alaska Supreme Court cited this phrase as a factor in its decision to reject the traditional rule.<sup>397</sup> The courts of the two remaining states, Michigan<sup>398</sup> and Wisconsin,<sup>399</sup> have found a constitutional require-

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<sup>388</sup> *Id.* at 826-27.

<sup>389</sup> *Hammer*, 550 P.2d at 826.

<sup>390</sup> See *supra* note 380 for the language of the Alaska constitution applicable to takings.

<sup>391</sup> *Hammer*, 550 P.2d at 826.

<sup>392</sup> The *Hammer* court stated:

The amount of such damages is a matter largely within the state's control; by giving precise and early notice of the date when the property must be vacated it can keep the loss of profits due to necessary business interruption to a minimum. Since such loss of profits is an item of special damages, the condemnee has the burden of proving by a preponderance of the evidence the amount of profits lost as a direct result of the state's taking; such proof must meet the requirement of reasonable certainty as indicated.

*Id.* at 827 (footnote omitted).

<sup>393</sup> *Id.*

<sup>394</sup> See *supra* notes 112-19 and accompanying text for a discussion of "or damaged" clauses.

<sup>395</sup> See *supra* notes 259-80 and accompanying text for a discussion of Georgia law.

<sup>396</sup> See *supra* notes 281-311 and accompanying text for a discussion of Minnesota law.

<sup>397</sup> See *Hammer*, 550 P.2d at 824.

<sup>398</sup> See *supra* note 312 for the language of the Michigan constitution applicable to takings.

<sup>399</sup> See *supra* notes 361 & 362 and accompanying text for a discussion of the language of the Wisconsin constitution applicable to takings.



ment for the payment of business losses even absent such a provision. Thus, unlike what one might have expected, the presence of an "or damaged" clause does not greatly broaden the scope of recovery for property owners whose land has been taken.

The *Hammer* court's systematic rejection of the traditional rationales for finding business losses *damnum absque injuria*, and its approbatory discussion of other states' rejections of the business losses rule, suggest that the court intended the impact of this decision to be broader than its narrow holding would imply. The court emphasized, however, that it was not making "as sweeping a pronouncement of law" as was found in the decision of the other state courts rejecting the rule.<sup>400</sup> Yet, given the expansive reasoning set forth by the court, it is hard to imagine how the Alaska courts might limit the application of *Hammer* in the future.

Since *Hammer*, the Alaska courts have had little to say about the business losses rule.<sup>401</sup> Alaska's relative lack of commercial and industrial development undoubtedly makes takings involving business losses comparatively more rare in Alaska than they are in more densely-populated states. The clear and comprehensive opinion issued by the *Hammer* court, however, must also contribute to the lack of litigation over this topic.

### C. Constitutional Reform: Louisiana

Historically, the Louisiana courts denied compensation for "consequential" losses, such as business losses. Their oft-repeated refrain was that "[m]ere consequential injuries to the owners arising from discomfort, disturbance, injury to business and the like, remain, as they were, *damna absque injuria*"<sup>402</sup>—or, in the unsympathetic words of one court, "particular sacrifices which society has the right to inflict for the public good."<sup>403</sup> In calculating compensation, courts considered such losses only to the extent that they diminished the fair market value of the property being condemned.<sup>404</sup>

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<sup>400</sup> 550 P.2d at 826.

<sup>401</sup> See, e.g., *Triangle, Inc. v. State*, 632 P.2d 965, 967–69 (Alaska 1981) (holding that landowner must detail business losses with reasonable certainty and establish causation).

<sup>402</sup> *McMahon v. St. Louis, A. & T. R.R.*, 41 La. App. 827, 830, 6 So. 640, 641 (1889) (quoted in *Rapides Parish School Bd. v. Nassif*, 232 La. 218, 228–29, 94 So. 2d 40, 44 (1957)); see also *State ex rel. Dep't of Highways v. Mason*, 254 La. 1035, 1047, 229 So. 2d 89, 93 (1969); *Texas Pipe Line Co. v. Barbe*, 229 La. 191, 219, 85 So. 2d 260, 270 (1955).

<sup>403</sup> *McMahon*, 41 La. App. at 830, 6 So. at 641 (quoted in *Nassif*, 232 La. at 228–29, 94 So. 2d at 44).

<sup>404</sup> See, e.g., *Mason*, 254 La. at 1047, 229 So. 2d at 93 ("the replacement cost of a building

In 1974, however, the Louisiana legislature redrafted the state constitution. Its predecessor, the 1921 constitution, had merely required payment of "just and adequate compensation" for a taking.<sup>405</sup> The new constitution<sup>406</sup> made an explicit attempt to afford property owners greater rights in condemnation actions. For example, the new provision limits the power of certain entities to condemn<sup>407</sup> and guarantees the property owner the right to a jury trial for determination of compensation.<sup>408</sup> The most dramatic change, however, was the replacement of the provision that the owner receive "just and adequate compensation" with a new re-

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... may be considered in determining consequential damages, but only as a factor which may directly affect the reduction of market value as a result of the partial taking"); *Texas Pipe Line Co.*, 229 La. at 219, 85 So. 2d at 270 ("damages . . . resulting from expropriation of property rights are the difference between the market value of the property for sale or rental purposes, immediately before and immediately after the expropriation").

<sup>405</sup> LA. CONST. of 1921, art. I, § 2 states: "No person shall be deprived of life, liberty or property, except by due process of law. Except as otherwise provided in this Constitution, private property shall not be taken or damaged except for public purposes and after just and adequate compensation is paid."

<sup>406</sup> LA. CONST. art. I, § 4 provides:

Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property. This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power.

Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit. Property shall not be taken or damaged by any private entity authorized by law to expropriate, except for a public and necessary purpose and with just compensation paid to the owner; in such proceedings, whether the purpose is public and necessary shall be a judicial question. In every expropriation, a party has the right to trial by jury to determine compensation, and the owner shall be compensated to the full extent of his loss. No business enterprise or any of its assets shall be taken for the purpose of operating that enterprise or halting competition with a government enterprise. However, a municipality may expropriate a utility within its jurisdiction. Personal effects, other than contraband, shall never be taken.

This Section shall not apply to appropriation of property necessary for levee and levee drainage purposes.

*Id.* See generally 7 RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973: CONVENTION TRANSCRIPTS, Sept. 13, 1973, at 1241-42 [hereinafter TRANSCRIPTS]; Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 10-20 (1974); Jenkins, *The Declaration of Rights*, 21 LOY. L. REV. 9, 19-27 (1975) (discussing article I, section four of the Louisiana constitution of 1974). (Representative Jenkins is a member of the Louisiana House of Representatives, a delegate to the Louisiana Constitutional Convention, and the author of this provision of the constitution.)

<sup>407</sup> Although the state and its political subdivisions can continue to take property for "public purposes," private entities authorized by law to expropriate may take property only for "public and necessary purposes." LA. CONST. art. I, § 4 (quoted in *supra* note 406); see also Hargrave, *supra* note 406, at 16-17; Jenkins, *supra* note 406, at 21-22.

<sup>408</sup> LA. CONST. art. I, § 4 (quoted in *supra* note 406). See generally Hargrave, *supra* note 406, at 14-15; Jenkins, *supra* note 406, at 23.

quirement that "the owner shall be compensated to the full extent of his loss."<sup>409</sup> This new phrasing was not merely a random choice of words; rather, the terms were selected with care and were intended to have a significant and substantial impact on condemnees' rights.<sup>410</sup>

This new Louisiana provision was patterned after the Montana constitution, which requires compensation to the "full extent of *the* loss."<sup>411</sup> The Louisiana constitution, however, deliberately requires that the owner be compensated "to the full extent of *his* loss."<sup>412</sup> According to Representative Jenkins, the author of the provision, the replacement of the article "the" with the possessive "his" was intended to indicate that "compensation is to be determined subjectively with emphasis on the value placed on the property by the owner instead of on its so-called market value or replacement cost."<sup>413</sup> Although the constitution may not mandate recovery of subjective damages,<sup>414</sup> the delegates to the constitutional convention certainly intended that the recovery available under the 1974 constitution be greater than that available under the 1921 constitution,<sup>415</sup> and that intangible and incidental losses to the owner unrelated to the value of the property be compensable.

The comments and debate by the delegates reveal that they anticipated that the compensation provision would result in extensive changes in the law. The Committee Report stated that "[t]he term 'full extent of the loss' is intended to permit the owner whose property has been taken to remain in equivalent financial circumstances after the taking."<sup>416</sup> The phrase was intended to include

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<sup>409</sup> LA. CONST. art. I, § 4 (*quoted in supra* note 406).

<sup>410</sup> See *infra* notes 416-24 and accompanying text for a discussion of the meaning of this phrase.

<sup>411</sup> MONT. CONST. art. II, § 29 (emphasis added). The Montana Constitution states: Private property shall not be taken or damaged for public use without just compensation to the full extent of the loss having been first made to or paid into court for the owner. In the event of litigation, just compensation shall include necessary expenses of litigation to be awarded by the court when the private property owner prevails.

*Id.*

<sup>412</sup> LA. CONST. art. I, § 4 (emphasis added) (*quoted in supra* note 406).

<sup>413</sup> Jenkins, *supra* note 406, at 24.

<sup>414</sup> Louisiana's third circuit has rejected the notion that landowners are entitled to recover for what they subjectively believe to be their losses. *E.g.*, State *ex rel.* Dep't of Highways v. Johnson, 369 So. 2d 191, 194 (La. Ct. App. 1979); State *ex rel.* Dep't of Highways v. Champagne, 356 So. 2d 1136, 1140 (La. Ct. App. 1978).

<sup>415</sup> Jenkins, *supra* note 406, at 23-24.

<sup>416</sup> 1 RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973: JOURNAL OF PROCEEDINGS, July 6, 1973, at 86 (citation omitted).

items "which, perhaps, in the past may have been considered *damnum absque injuria*, such as cost of removal,"<sup>417</sup> costs of litigation and attorneys fees,<sup>418</sup> costs of reestablishing a business,<sup>419</sup> inconvenience,<sup>420</sup> or loss of business profits.<sup>421</sup> To facilitate this comprehensive measure of damages, the delegates intended that "owner" and "property" be defined in their "broadest sense."<sup>422</sup> For example, one delegate suggested during the debate that a tenant farmer with an unrecorded lease whose crops are damaged by a pipeline would be compensated as "the owner of a real right."<sup>423</sup> Likewise, a tenant could recover the full costs of relocating a business, without regard to the value of the landlord's property being taken.<sup>424</sup>

The delegates intended that this new provision revolutionize Louisiana condemnation law and expand property owners' rights. The new constitutional provision has achieved these goals. As predicted, however, it also gave rise to litigation almost immediately.<sup>425</sup> The Louisiana appellate courts, when faced with the new compensation requirement, found its meaning unclear.<sup>426</sup>

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<sup>417</sup> Lanier, 7 TRANSCRIPTS, *supra* note 406, Sept. 13, 1973, at 1240-41.

<sup>418</sup> According to Jenkins:

[S]uppose a highway comes across the corner of your property. You are offered five hundred dollars for it; it's worth a thousand. At present, there is no way you can get what it's worth because if you go to court and challenge that offer and try to get your thousand dollars, and even if you win, you are going to lose, because of the cost of going to court, hiring an attorney, which you'll have to pay. So this would be an attempt to take into account that fact.

Jenkins, 6 TRANSCRIPTS, *supra* note 406, Aug. 30, 1973, at 1031.      ♦

<sup>419</sup> 7 TRANSCRIPTS, Sept. 13, 1973, *supra* note 406, at 1241.

<sup>420</sup> In a Memorandum from East Baton Rouge City-Parish Attorney Joseph Keough to Committee on Bill of Rights and Elections, on behalf of himself and seven other attorneys representing the City-Parish government, the Louisiana Department of Highways, the City of New Orleans and several utility and pipe line companies, June 6, 1973 (*quoted in* Jenkins, *supra* note 406, at 22 n.69):

[T]he addition of the words "for the full extent of the loss" suggests that the amount should be something more than the courts presently allow for just compensation . . . [Under the 1921 Constitution] the courts have . . . disallowed compensation for such items as inconvenience, loss of aesthetic value (unless resulting in loss of monetary value of the property), loss of business profits, and the like, and it seems probable that the additional language proposed will be construed as a mandate to the courts to include compensation for those items.

*Id.*

<sup>421</sup> 7 TRANSCRIPTS, *supra* note 406, Sept. 13, 1973, at 1240-41; 6 TRANSCRIPTS, *supra* note 406, Aug. 30, 1973, at 1031, 1032, 1063-66.

<sup>422</sup> Lanier, 7 TRANSCRIPTS, *supra* note 406, Sept. 13, 1973, at 1240 ("Owner of property, and the word 'owner' and [']property' here, is intended to be used in its broadest sense.").

<sup>423</sup> *Id.* at 1241.

<sup>424</sup> *Id.*

<sup>425</sup> Hargrave, *supra* note 406, at 16.

<sup>426</sup> The Louisiana third circuit recognized that the new provision was intended to

*State ex rel. Department of Highways v. Constant*<sup>427</sup> provided the Louisiana Supreme Court with its first opportunity to construe the new provision on compensation. In *Constant*, the state highway department had expropriated an improved parking and loading area used by a marina serving oil field contractors and suppliers.<sup>428</sup> The condemnee argued that it was entitled to the amount needed to construct a replacement parking and loading facility on the opposite shore of the bayou. The state protested, pointing out that the amount needed to reconstruct the facility at the new location was in excess of the market value of the tract being taken. The supreme court acknowledged that the condemnation of the loading and parking area had effectively destroyed the marina's business operations on the entire parent tract.<sup>429</sup> Despite the destruction of business operations, however, the appeals court had agreed with the state that the compensation for a partial taking could not exceed the market value of the entire parent tract prior to the taking.<sup>430</sup>

The supreme court began its review of the appellate court's decision by endorsing the lower court's finding that the new constitutional provision enlarged the measure of damages in condemnation cases, and was intended to allow the property owner "to remain in equivalent financial circumstances after the taking."<sup>431</sup>

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broaden the measure of compensation. It thus interpreted the requirement that the owner "be compensated to the full extent of his loss" as meaning that, in addition to receiving the market value of the property taken and severance damages to the remainder, the owner must be placed "in as a good a position pecuniarily as he would have been, had his property not been taken." *State ex rel. Dep't of Highways v. Champagne*, 356 So. 2d 1136, 1140 (La. Ct. App. 1978); *State ex rel. Dep't of Highways v. Alexandria Volkswagen, Inc.*, 348 So. 2d 176, 178 (La. Ct. App. 1977). The first circuit, on the other hand, initially held that the measure of compensation under the 1974 constitution remained the same as it was under the 1921 constitution: market value. *Louisiana Power & Light Co. v. Caldwell*, 353 So. 2d 371, 375 (La. Ct. App. 1977) ("[T]he test remains 'market value, based on the most recent comparable conventional sales of similar property, and the highest and most profitable use to which the property may be put in the foreseeable future, excluding remote and speculative value.'" (quoting *City of New Orleans v. O'Krepki*, 162 So. 2d 76, 78 (La. Ct. App. 1964))), *rev'd*, 360 So. 2d 848 (La. 1978). When faced with the issue a second time just five months later, however, the first circuit, after reviewing the legislative history, reversed itself and held that the constitutional provision did, in fact, "broaden[] the scope and concept of the measure of damages recoverable in expropriation cases." *State ex rel. Dep't of Highways v. Constant*, 359 So. 2d 666, 672 (La. Ct. App. 1978). The court now held that "the provision envisions recovery for business losses, moving expenses and other intangibles in a proper case and upon adequate proof of such losses," though it found no such proof present in the instant case. *Id.*

<sup>427</sup> 369 So. 2d 699 (La. 1979).

<sup>428</sup> *Id.* at 701.

<sup>429</sup> *Id.*

<sup>430</sup> *Constant*, 359 So. 2d at 672.

<sup>431</sup> 369 So. 2d at 701 (quoting *Constant*, 359 So. 2d at 671).

Because the constitution does not require that the compensation be calculated by any particular method, the court rejected the state's contention that business losses can be calculated only by applying a capitalized-income approach.<sup>432</sup> Rather, once the condemnee had established a reasonable measure of its loss, the burden shifted to the condemnor to show that replacement was not justified by the income potential of the business.<sup>433</sup> The court concluded that, "considering the unique value of the loading area" to the condemnee's commercial operations, "perhaps[] the most direct and sensible means" of calculating the compensation was the replacement cost of constructing a new facility.<sup>434</sup>

The supreme court in *Constant* justified its holding in terms of the new constitutional provision. The court noted that it was "not constitutionally significant" that the award would exceed the market value of the entire tract.<sup>435</sup> The condemnee had suffered "substantial pecuniary business damage,"<sup>436</sup> which required, in addition to compensation for the "surface value of the land and improvements taken,"<sup>437</sup> compensation for the "loss occasioned their business operations by the taking of the loading area indispensable to them."<sup>438</sup>

Thus, the Louisiana Constitution of 1974 mandates that business owners receive sufficient compensation to restore their business facilities to their pre-condemnation condition, even where the compensation so required exceeds the market value of the entire parent tract.<sup>439</sup> The *Constant* court emphasized that "[t]he very purpose of the constitutional language was to compensate an owner for any loss he sustained by reason of the taking, not restricted . . . to the market value of the property taken and the loss of market value of the remainder."<sup>440</sup>

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<sup>432</sup> *Id.* at 705.

<sup>433</sup> *Id.*

<sup>434</sup> *Id.* Expert testimony revealed no comparable sales of marina facilities or marine businesses by which to estimate value. *Id.* at 703.

<sup>435</sup> *Id.* at 702.

<sup>436</sup> *Id.* at 704. The court stated:

[The taking] virtually destroyed the commercial usefulness to them of their boat slip, and it was indispensable to them in their commercial loading and boat-launching activities—and these economic activities, directly serviced by the loading and parking area which were expropriated, substantially contributed to the economic success of their other economic activities conducted at the site, primarily their crewboat rental and gasoline sales businesses.

*Id.*

<sup>437</sup> *Id.*

<sup>438</sup> *Id.* at 705 (footnote omitted).

<sup>439</sup> See *id.* at 702.

<sup>440</sup> *Id.* (citation omitted). *Constant* did not mandate exclusive use of the replacement cost

However, this opinion left open several questions regarding the precise scope of the compensation required. For example, as one commentator noted, even though the court emphasized that the landowner was entitled to recover any loss he or she incurred, the award included only those incidental losses that were inherent in the value of the property;<sup>441</sup> the court did not address other damages, such as loss of profits while the marina was being rebuilt.<sup>442</sup> The opinion did not indicate whether such losses were not recoverable, or whether the condemnee simply failed to present proof of such damages. Likewise, the opinion did not specify whether damages are to be measured in subjective terms, as urged by Rep-

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method of calculating compensation. Moreover, even though the court found that a deduction for depreciation was not warranted under the facts of that case, it did not hold that depreciation should *never* be considered. *Id.* at 706. Rather, the *Constant* court found that replacement cost was an appropriate means of determining compensation under the circumstances because of the condemned facility's "unique and indispensable value" to the condemnee's business operations. *Id.* at 707. The court stated:

We do not, by these rulings, announce any general principle that replacement cost is always the most appropriate measure of awarding a landowner compensation for the taking of a physical asset used in his business, nor that the depreciation of the former asset should never be considered.

Generally, we assume, the landowners may be compensated fully by other approaches than by awarding them the replacement cost of the improvement taken, especially where (unlike the present instance) the property is not shown to be both unique in nature and location and also indispensable to the conduct of the landowners' business operations on the site from which a part is taken. Likewise, in the usual situation the depreciated value of the asset taken will have some lessening effect on the award to the landowner, since he may be fully compensated by the actual pecuniary value of the asset taken. For instance, the full compensation constitutionally provided does not require that the owner receive a new building to replace a dilapidated one which is expropriated.

In the present case, however, the depreciation theories are of an essentially theoretical nature insofar as their effect upon the actual serviceability and economic value of the nature of the property (the loading strip) taken. Its replacement cost is appropriate, because of its unique and indispensable value to the defendants' business operations conducted at the site.

*Id.* at 706-07.

Although, generally, replacement cost is reduced for depreciation, the depreciation referred to is not the theoretical depreciation used for accounting purposes, but rather "functional and economic obsolescence." See *Monroe Redev. Agency v. Kusun*, 398 So. 2d 1159, 1161 (La. Ct. App.), *cert. denied*, 405 So. 2d 530 (La. 1981). The nature of the facility and the condemnee's regular program of maintenance meant that there was no actual depreciation present in *Constant*, so no depreciation deduction was appropriate. *Constant*, 369 So. 2d at 706. ("More probably than not, despite its theoretical 30-year life expectancy, the expropriated loading strip at the end of thirty years would have still been as serviceable to them as on the date of taking.")

<sup>441</sup> Note, *Expropriation: Compensating the Landowner to the Full Extent of His Loss*, 40 LA. L. REV. 817, 824 (1980).

<sup>442</sup> *Id.*

representative Jenkins,<sup>443</sup> or objective terms. The court's repeated use of phrases such as "economic loss,"<sup>444</sup> "substantial pecuniary business damage,"<sup>445</sup> and "equivalent financial circumstances"<sup>446</sup> suggests that the latter interpretation should prevail.<sup>447</sup>

Subsequent interpretation and development of the business losses rule in Louisiana has occurred at the appellate court level. Courts now have determined that property owners can recover for the loss of future rental income under a lease,<sup>448</sup> and lessees can recover for the loss of a business interest.<sup>449</sup> Loss of business profits,

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<sup>443</sup> See *supra* note 413 and accompanying text for a discussion of Representative Jenkins's statements.

<sup>444</sup> *Constant*, 369 So. 2d at 703.

<sup>445</sup> *Id.* at 704.

<sup>446</sup> *Id.* at 701 (quoting *Constant*, 359 So. 2d at 671, with approval).

<sup>447</sup> See Note, *supra* note 441, at 826-27. The three traditional methods of estimating fair market value in expropriation cases—comparable sales, capitalization of income, and replacement cost less depreciation—continue to apply. See *id.* at 819-20. The comparable sales method remains the preferred technique, however, and is used wherever it will give an adequate measure of damages. See *State ex rel. Dep't of Transp. & Dev. v. Sonnier*, 503 So. 2d 1144, 1146 (La. Ct. App.), *cert. denied*, 506 So. 2d 1230 (La. 1987). The lower courts have steadfastly maintained that replacement cost is available only where the property taken is unique in nature and location and is indispensable to the business operations conducted at the site. See, e.g., *State ex rel. Dep't of Transp. v. Campisi*, 509 So. 2d 618, 620-21 (La. Ct. App. 1987) (holding that replacement cost was not available because property was not unique and indispensable); *Sonnier*, 503 So. 2d at 1148 (holding that replacement cost was not available because property was not unique and indispensable); *State ex rel. Dep't of Transp. & Dev. v. Hecker*, 493 So. 2d 125, 129 (La. Ct. App.), *cert. denied*, 494 So. 2d 325, *cert. denied*, 494 So. 2d 326 (La. 1986) (allowing use of replacement cost because property was unique and indispensable); *State ex rel. Dep't of Transp. & Dev. v. Shannon-Page Inv. Co.*, 478 So. 2d 702, 705, 707 (La. Ct. App. 1985) (holding that replacement cost was not appropriate where property was rental property and condemnee did not have ongoing business on property that would be disturbed); *Monroe Redev. Agency v. Kusun*, 398 So. 2d 1159 (La. Ct. App.) (holding that replacement cost was available because property was unique and indispensable), *cert. denied*, 405 So. 2d 530 (La. 1981). The burden of proof remains on the property owner to establish the compensation due by a reasonable preponderance of the evidence. According to the Louisiana Court of Appeals, "speculation, conjecture, mere possibility, and even unsupported probability are not sufficient to support a judgment." *State ex rel. Dep't of Transp. & Dev. v. Jacob*, 491 So. 2d 138, 140-41 (La. Ct. App. 1986) (citing *State ex rel. Dep't of Highways v. Levy*, 242 La. 259, 136 So. 2d 35 (La. 1961); *State ex rel. Dep't of Transp. & Dev. v. Estate of Clark*, 432 So. 2d 405 (La. Ct. App. 1983)). Thus, for example, the condemnee in *Campisi* did not receive compensation for his lost rental income because the court found that the lack of proof made the amount speculative. *Campisi*, 509 So. 2d at 620. Likewise, the court in *State ex rel. Department of Transportation & Development v. Manuel* refused to allow compensation for future profits because the month-to-month lease that the business was operating under made the amount speculative. 451 So. 2d 659, 662 (La. Ct. App. 1984).

<sup>448</sup> See, e.g., *State ex rel. Dep't of Transp. & Dev. v. Davis*, 400 So. 2d 926, 928 (La. Ct. App.) (overruling *City of New Iberia v. Yeutter*, 307 So. 2d 393 (La. Ct. App. 1975)), *cert. denied*, 406 So. 2d 611, *cert. denied*, 409 So. 2d 611 (La. 1981).

<sup>449</sup> See, e.g., *State ex rel. Dep't of Transp. & Dev. v. Sheridan*, 517 So. 2d 415, 418 (La.



which were not compensable under the 1921 constitution, are compensable under the 1974 constitution.<sup>450</sup> However, the Louisiana courts will not compensate every business loss flowing from a taking. For example, when awarding replacement cost to the owners of a bulk oil distribution facility, the appeals court found no authority for awarding the costs of financing, even though it recognized that "the cost of financing is a real and valid expense of replacement."<sup>451</sup>

The Louisiana Constitution of 1974, and the opinions interpreting it, afford property owners in Louisiana greater protection than they would receive virtually anywhere else in the United States. This provision rejects the notions that the public fisc cannot support full and complete compensation for takings, that public projects would be thwarted by increased costs if such compensation were allowed, and that individuals should be forced to endure a loss for the sake of a public gain.<sup>452</sup> This new constitutional provision is the clearest acknowledgment to date that takings can inflict significant losses on business owners, and that equity dictates that such losses be compensated.

#### V. REJECTION OF THE BUSINESS LOSSES RULE: THE NEED FOR CONTINUING REFORM

As Justice Douglas once noted: "The law of eminent domain is fashioned out of the conflict between the people's interest in public

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Ct. App. 1987); *State ex rel. Dep't of Transp. & Dev. v. Exxon Corp.*, 430 So. 2d 1191, 1195 (La. Ct. App.), *cert. denied*, 437 So. 2d 1156 (1983). The *Exxon* court stated:

The right to use property for business pursuits in hope of generating a profit is clearly one of the rights which flows from property ownership. When this right is separated from the actual ownership of the property as in the instant case by lease, the lessee becomes an owner of a private property right and is entitled to protection from having the property taken without compensation just as the owner of property in full ownership has this right.

*Exxon Corp.*, 430 So. 2d at 1195.

<sup>450</sup> *Id.* at 1194-95.

<sup>451</sup> *Hecher*, 493 So. 2d at 130. The *Hecher* court stated:

We recognize that the cost of financing is a real and valid expense of replacement, particularly in this case where at time of trial the defendants' personal assets had already been liquidated and the proceeds spent on the [replacement] plant. However, we find no authority in the jurisprudence for awarding lost investment income or interest paid to a lender to finance replacement of an expropriated property. We believe that the legislature intended to compensate landowners at least partially for the loss of use of money by providing interest from the date of taking to the date of payment on the award of an excess over the state's deposit.

*Id.* (footnote omitted).

<sup>452</sup> *Cf. State ex rel. Dep't of Transp. & Dev. v. Sonnier*, 503 So. 2d 1144, 1145-46 (La. Ct. App.), *cert. denied*, 506 So. 2d 1230 (La. 1987).

projects and the principle of indemnity to the landowner."<sup>453</sup> The business losses rule brings this fundamental conflict into sharp focus. The essential question is how we, as a society, should balance our need and desire for economic progress and public works against our duty and desire to protect the sanctity of private property. Though we have embraced, through our federal and state constitutions, the notion that private ownership must succumb to public use when a public purpose intervenes, few citizens would be likely to agree that the private citizen must simply donate his or her property, or any portion thereof, to the government for the public good. Rather, where the public weal demands the confiscation of private property, the public fisc must compensate for its loss.

Our system of eminent domain is founded, in fact, upon precisely that principle—that just compensation is required when private property is taken for public use. Yet courts have interpreted the compensation equation narrowly and have limited its components so that most of the incidental and consequential injuries inflicted by a taking are not compensable. Instead, restrictive and anomalous doctrines, such as the business losses rule, deny property owners full and fair recompense for the damages they have suffered. Both the legal and economic environments have undergone dramatic transformations in the two centuries since this injurious legal doctrine was created. The time is ripe, therefore, for reexamining the historical antecedents of the business losses rule and its continuing relevance.

The historical antecedents of the business losses rule are self-evident; the rule sprang naturally from the context of the economic environment in which it arose. Early exercises of the eminent domain power did not create significant business losses. Condemnations were undertaken for purely public purposes and for specific, discrete projects, such as roads or mills, unlike the mass takings of entire areas and neighborhoods that we find today.<sup>454</sup> Land was plentiful, and displaced property owners found it relatively easy to relocate to similar property within the vicinity. Businesses were few, and business owners rarely suffered business losses.<sup>455</sup>

The physical setting of the nation thus provided the impetus for the narrow definitions of "property" and "taking" that first

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<sup>453</sup> United States *ex rel.* T.V.A. v. Powelson, 319 U.S. 266, 280 (1943).

<sup>454</sup> See *supra* notes 50 & 51 and accompanying text for a discussion of the nature of early exercises of the eminent domain power.

<sup>455</sup> See *supra* note 75 and accompanying text for a discussion of the effects of early takings on businesses.

emerged in the law. "Property" referred only to tangible items;<sup>456</sup> a "taking" required a physical invasion of that tangible property and an appropriation of it by the government to public use.<sup>457</sup> The business losses rule itself was black-letter law, a per se rule that was administratively convenient for the courts. It enabled courts to avoid the difficult question of whether goodwill and going-concern value actually were taken in a particular case, and the even more difficult question of how to value those interests if they were taken. Given the simple economic circumstances and relatively unsophisticated legal system in which the rule emerged, the doctrine was an efficient judicial response to what would have been a fairly minor, fairly rare problem.

Times changed, however, and the law changed to meet the new circumstances. The definitions of "property"<sup>458</sup> and "taking"<sup>459</sup> expanded to meet the new needs of a modernizing society and an industrializing economy. Property came to refer not only to the physical res, but also to the bundle of rights that an owner possesses with respect to the res,<sup>460</sup> and a "taking" was recognized as an interference with that bundle of rights.<sup>461</sup>

One would have expected that the modern definitions of "property" and "taking" would have rung the deathknell for the business losses rule. Indeed, the broad definitions of these terms that have evolved over the last two centuries should mandate recognition of business interests, such as goodwill and going-concern value, as property rights, just as other types of intangible rights are now so recognized.<sup>462</sup>

The United States Supreme Court's most recent examination of the business losses rule, in *Almota Farmers Elevator & Warehouse Co. v. United States*,<sup>463</sup> provides a frustrating example of the manner in which business losses are still treated in a majority of jurisdictions today—as somehow less-than-real losses, unworthy of compensa-

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<sup>456</sup> See *supra* note 80 and accompanying text for a narrow definition of "property" as including only tangible property.

<sup>457</sup> See *supra* note 96 and accompanying text for a definition of "taking."

<sup>458</sup> See *supra* notes 76-95 and accompanying text for a definition of "property."

<sup>459</sup> See *supra* notes 96-119 and accompanying text for a definition of "taking."

<sup>460</sup> See *supra* notes 88-95 and accompanying text for a discussion of the expanded definition of "property."

<sup>461</sup> See *supra* notes 104-11 and accompanying text for a discussion of the expanded definition of "taking."

<sup>462</sup> See *supra* notes 91-95 and accompanying text for a discussion of various types of intangible property interests.

<sup>463</sup> 409 U.S. 470 (1973).

tion. *Almota* illustrates the hands-off approach that most courts have taken to the business losses rule, as well as the common failure of courts to articulate reasoned, reasonable rationales for their continuing adherence to this outmoded legal tradition. Yet *Almota* also provides an intriguing glimpse of the future of the business losses rule, as courts begin to recognize the property rights inherent in intangible assets such as goodwill and going-concern value.

*Almota* had conducted grain elevator operations on land adjacent to a railroad track under a series of successive leases.<sup>464</sup> It had built extensive structures and other improvements on the land based upon its expectation that the lease would continue to be renewed as it had been in the past. At the time the government sought to condemn the land, the then-current lease had seven and one-half years yet to run. The government contended that just compensation should include only the fair market value of the remaining lease term. The government had no need for the improvements and therefore felt *Almota* was entitled only to the right to remove the structures, rather than compensation for their loss. This result, of course, would have left *Almota* with only the slight salvage value associated with the buildings.

*Almota*, on the other hand, contended that it was entitled to receive the amount a willing buyer would have paid a willing seller in an open market for the leasehold and improvements. Because of the expectancy of continued renewal of the lease, this amount would include the value of the improvements in place over their useful life.<sup>465</sup> The district court agreed with *Almota*, but the circuit court reversed, accepting the government's argument that a tenant's expectancy in a lease renewal was not a compensable legal interest and therefore no award for the use of the improvements beyond the current lease term was available.<sup>466</sup>

The Supreme Court reversed again,<sup>467</sup> noting that just compensation "means the full monetary equivalent of the property taken."<sup>468</sup> Thus, the court must look at what a willing buyer would pay for the improvements<sup>469</sup> and, given the unbroken pattern of lease renewals for almost fifty years, that figure would include payment for the continued ability of the buyer to use the improvements

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<sup>464</sup> *Id.* at 471.

<sup>465</sup> *Id.*

<sup>466</sup> *Id.* at 472.

<sup>467</sup> *Id.* at 473.

<sup>468</sup> *Id.*

<sup>469</sup> *Id.* at 474.

over their remaining useful life.<sup>470</sup> The majority clearly regarded the improvements as "private property" that had been "taken" by the government and so was deserving of compensation.<sup>471</sup> The Court was careful to note, however, that although *Almota* might have also suffered lost profits or loss of going-concern value, it was not seeking, nor receiving, recovery for such.<sup>472</sup> The Court acknowledged that *Mitchell v. United States*<sup>473</sup> had held that the government need not pay for business losses, "[b]ut it assuredly did not hold that the Government could fail to provide fair compensation for business improvements that are taken—dismiss them as worth no more than scrap value—simply because it did not intend to use them."<sup>474</sup>

The majority also attempted, with less success, to distinguish *United States v. Petty Motor Co.*,<sup>475</sup> a 1946 opinion in which the Court had held that because an expectation of a lease renewal was not a compensable interest, a leasehold should be valued only in terms of its use and occupancy during the remainder of the lease term. The difference in outcome, the *Almota* Court stated, arose because in *Petty* the Court was not dealing with the fair market value of improvements.<sup>476</sup> In *Almota*, on the other hand, the condemnee had constructed the improvements and sought only their fair market value. The Court explained that "there is no question here of creating a legally cognizable value where none existed, or of compensating a mere incorporeal expectation."<sup>477</sup> Thus, the majority's distinction hints at a physical definition of "property"—an approach which, as we have already seen,<sup>478</sup> has long-since been abandoned.

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<sup>470</sup> *Id.* at 475. The *Almota* Court noted:

If there had been no condemnation, *Almota* would have continued to use the improvements during a renewed lease term, or if sold the improvements to the fee owner or to a new lessee at the end of the lease term, it would have been compensated for the buyer's ability to use the improvements in place over their useful life.

*Id.* at 474.

<sup>471</sup> *Id.* at 475 n.2.

<sup>472</sup> *Id.* The Court added: "*Almota* may well be unable to operate a grain elevator business elsewhere; it may well lose the profits and other values of a going business, but it seeks compensation for none of that."

<sup>473</sup> 267 U.S. 341 (1925). See *supra* notes 110 & 111 and accompanying text for a discussion of *Mitchell*.

<sup>474</sup> *Almota*, 409 U.S. at 476 n.2.

<sup>475</sup> 327 U.S. 372 (1946).

<sup>476</sup> *Almota*, 409 U.S. at 476.

<sup>477</sup> *Id.* (footnote omitted).

<sup>478</sup> See *supra* notes 96–111 and accompanying text for a discussion of the meaning of "taking."

*Almota* was a five to four decision. As the dissent, written by Justice Rehnquist, points out, the majority opinion is inconsistent with the Court's existing rule denying compensation for loss of goodwill and going-concern value.<sup>479</sup> Though the government did not want the improvements, the taking of the leasehold interests did prevent *Almota* from using the improvements as intended over their useful life. The dissent expressed concern that although the "property" interest would have expired in seven and one-half years, at the end of the lease term, the fair market value of the interest was computed based upon "expectancies that do not rise to the level of a property interest under the Fifth Amendment."<sup>480</sup> The dissent felt that this would have unsettling repercussions on the rule prohibiting recovery of goodwill or going-concern value.<sup>481</sup>

The majority logically could reconcile its decision with previous holdings denying recovery of business losses only by saying that the expectation of realizing income from the use of the leasehold improvements is "property," but that business interests, such as goodwill or going-concern value, are not. And that is perhaps the most frustrating legacy of *Almota*—the failure of either the majority or the dissent to indicate *why* business interests should not be recognized as property interests for purposes of eminent domain law.

The common refrain that goodwill and going-concern value are not property interests in the "constitutional sense"<sup>482</sup> has never been adequately explained or justified by a court adopting it. It is

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<sup>479</sup> See *Almota*, 409 U.S. at 483–84 (Rehnquist, J., dissenting) (citing *United States ex rel. T.V.A. v. Powelson*, 319 U.S. 266, 283 (1943); *Mitchell v. United States*, 267 U.S. 341, 345 (1925)).

<sup>480</sup> *Id.* at 484 (Rehnquist, J., dissenting).

<sup>481</sup> Justice Rehnquist stated:

If permissible methods of valuation are to be thus totally set free from the property interest that they purport to value, it is difficult to see why the same standards should not be applied to a going business. Although the Government does not take the going business, and although the business is not itself a "property" interest within the Fifth Amendment, since purchases on the open market would have paid an added increment of value for the property because a business was located on it, it may well be that such increment of value is properly included in a condemnation award under the Court's holding today. And it will assuredly make no difference to the property owner to learn that destruction of a going business is not compensable, if he be assured that the property concededly taken upon which the business was located may be valued in such a way as to include the amount a purchaser would have paid for the business.

*Id.* at 484–85 (Rehnquist, J., dissenting).

<sup>482</sup> See *supra* notes 140–45 and accompanying text for a discussion of this theory of noncompensability.

difficult to understand why "property" can include intangibles such as goodwill or going-concern value for purposes such as taxation or private litigation,<sup>483</sup> but not for purposes of just compensation under the Constitution, without resorting to the twisted logic Humpty Dumpty gave to Alice: "When *I* use a word, it means just what *I* choose it to mean—neither more nor less."<sup>484</sup> As Alice aptly noted in response, "The question is, whether you *can* make words mean so many different things."<sup>485</sup> Goodwill and going-concern value either are property interests or they are not; their status should not change to meet the purposes of the government in a given situation. Given the expanded definitions of "property" and "taking," goodwill and going-concern value surely must be recognized as compensable interests under state and federal constitutions.

In fact, many of the state courts that have rejected the business losses rule have focused upon the type of property interest interfered with by the government. They have evinced a willingness to look beyond the intangible nature of goodwill or going-concern value and to reconsider the definitions of "property" and "taking" under their state constitutions.<sup>486</sup>

The other rationales given for the business losses rule are similarly flawed. It is ludicrous to state that goodwill and going-concern value are not compensable because they have not been "taken."<sup>487</sup> Though the government may have only wanted the land and not the business, condemnation actions often result in a destruction or damaging of the underlying business interests as well.<sup>488</sup> As several courts have recognized, the large-scale condemnations that mark many redevelopment projects today can result in a destruction of the surrounding neighborhood and clientele base such that the business and its accompanying goodwill or going-concern value are unavoidably and irreparably damaged or destroyed.<sup>489</sup> In such cir-

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<sup>483</sup> See *supra* notes 137-39 and accompanying text for a discussion of the valuation of goodwill for purposes of taxation or private litigation.

<sup>484</sup> L. CARROLL, *THROUGH THE LOOKING GLASS* 274 (Penguin Books 1983).

<sup>485</sup> *Id.*

<sup>486</sup> See, e.g., *State v. Hammer*, 550 P.2d 820 (Alaska 1976) (discussed *supra* at notes 374-400 and accompanying text); *Bowers v. Fulton County*, 221 Ga. 731, 146 S.E.2d 884 (1966) (discussed *supra* at notes 259-67 and accompanying text); *State v. Saugen*, 283 Minn. 402, 169 N.W.2d 37 (1969) (discussed *supra* at notes 281-99 and accompanying text).

<sup>487</sup> See *supra* notes 122-28 and accompanying text for a discussion of this theory of noncompensability.

<sup>488</sup> The *Almota* Court hinted at this in the context of business improvements, but refused to extend this argument to business interests such as goodwill or going-concern value. See *supra* note 470 and accompanying text for a discussion of this aspect of *Almota*.

<sup>489</sup> See, e.g., *City of Detroit v. Michael's Prescriptions*, 143 Mich. App. 808, 821, 373

cumstances, the business owner may well find it impossible to transfer the goodwill or going-concern value to a new location without a loss in value. Thus, it can scarcely be argued that the possibility of a business loss occurring is speculative because there is only a "remote possibility"<sup>490</sup> that the owner will not be able to relocate.

Even if the business can be relocated, a diminution in patronage or recombination of the assets at a new site can cause a reduction in the underlying goodwill or going-concern value, thus inflicting a loss upon the business owner which, in most jurisdictions, will not be compensated. Moreover, to say that the owner can simply relocate and rebuild his or her goodwill or going-concern value elsewhere:

begs the whole rationale underlying the right to damages. For example, one could with equal force tell a plaintiff in a personal injury case that his wounds will heal and eventually he will do as well as before, which may be perfectly true, but it ignores the damages arising out of the wounding and the cost of healing. Obviously, business too, can be "wounded" and their "healing" too, has economic consequences which are harmful, notwithstanding that the business may ultimately survive.<sup>491</sup>

It may be true in some instances that no compensable loss exists because the goodwill or going-concern value was not injured or could have been moved, but the inquiry is fact-specific and should be made on a case-by-case basis. If the goodwill or going-concern value was not damaged or could have been moved, at least in part, then the amount of the recovery should be adjusted downward accordingly. There is no defensible reason to create a per se rule denying all business owners recovery simply because a few business owners suffer little or no loss. A mitigation requirement is valid; a blanket rejection of all recovery is not.

Nor can it legitimately be said that business losses are so difficult to value and so speculative and uncertain in amount that the courts cannot award recovery for them. First, the Supreme Court has established that uncertainty as to the exact measure of damages is

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N.W.2d 219, 225 (1985) (citing *Community Redev. Agency v. Abrams*, 15 Cal. 3d 813, 825-26, 543 P.2d 905, 914, 126 Cal. Rptr. 473, 482 (1975), *cert. denied*, 429 U.S. 869 (1976)); *Luber v. Milwaukee County*, 47 Wis. 2d 271, 279-80, 177 N.W.2d 380, 384-85 (1970)).

<sup>490</sup> See *supra* notes 129-31 and accompanying text for a discussion of this theory of noncompensability.

<sup>491</sup> Kanner, *supra* note 1, at 73 n.80.



no basis for denying recovery altogether.<sup>492</sup> Second, as pointed out earlier, courts can value goodwill and going-concern value in other contexts and, in fact, have little difficulty in valuing even more nebulous types of damages.<sup>493</sup> The question is simply an evidentiary one; if the condemnee is able to prove his or her damages with reasonable specificity, recovery should be forthcoming.<sup>494</sup> And indeed, the Supreme Court was able to value a *temporary* taking of going-concern value in *Kimball Laundry*<sup>495</sup>—a much more difficult calculation, surely, than a permanent taking of the same.

Fiscal concerns also play a large role in the judiciary's perpetuation of the business losses rule. Many of the courts that have denied recovery for business losses have expressed concern about the strains that would be placed upon the public purse if every business loss created by a taking had to be compensated.<sup>496</sup> They worry that some public projects might not be undertaken if the scope of recovery were broadened.<sup>497</sup>

Yet this concern is precisely why the courts should require compensation for business losses. As governmental entities increasingly focus on redevelopment, takings that result in incidental injuries, such as business losses, are bound to increase. As these takings become more and more common, we run the risk of becoming immunized to their often disastrous effects on property owners.<sup>498</sup> As Justice Holmes stated over half a century ago, "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter

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<sup>492</sup> *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927).

<sup>493</sup> See *supra* notes 137–39 and accompanying text for a discussion of the valuation of goodwill for purposes of taxation or private litigation.

<sup>494</sup> That is precisely the approach adopted by state courts that do allow recovery for business losses. See, e.g., *supra* notes 381–84 and accompanying text (Alaska); *supra* note 447 (Louisiana).

<sup>495</sup> See *supra* notes 148–72 and accompanying text for a discussion of *Kimball*.

<sup>496</sup> E.g., *O'Connor v. Pittsburgh*, 18 Pa. 187, 189–90 (1851) (*overruled on different grounds* in *Mayle v. Pennsylvania Dep't of Highways*, 479 Pa. 403, 388 A.2d 718 (1978)).

<sup>497</sup> Cf. Klein, *Eminent Domain: Judicial Response to the Human Disruption*, 46 J. URB. L. 1, 34 (1988) ("The obvious question which springs to the fore is: How do the courts know? Having never afforded compensation for most consequential injuries arising from eminent domain, it becomes clear that the courts can not 'know.'") (footnote omitted).

<sup>498</sup> This point was made over three decades ago by the Fifth Circuit, during the era of the great highway constructions: "This is a period of great governmental expansion, with enormously stepped up numbers of takings of private property for public use by expropriation, a streamlining of procedures for taking, and because familiarity breeds contempt, a consequent growing and, therefore alarming attitude of complacency." *Slattery Co. v. United States*, 231 F.2d 37, 41–42 (5th Cir. 1956).

cut than the constitutional way of paying for the change."<sup>499</sup> The fact that the loss is not compensated does not render it any less real an injury. Rather, courts that engage in this type of reasoning make uninformed, unwarranted assumptions about what society can or cannot afford to pay for, and in so doing, they impermissibly insert themselves into the planning process. The judiciary's role should be to protect private citizens from the rampages of public projects; the laudable goal of economic development (or redevelopment), and the extensive costs associated therewith, should not blind the law to the rights of the individual.<sup>500</sup> The judiciary should simply ensure that the property owner receives just compensation for *all* of the losses inflicted by a taking. The difficult decisions as to which projects should go forward given our undeniably limited resources should be left to the legislature.

Moreover, economic efficiency concerns demand that the business losses rule be abandoned. If condemnors are not forced to bear every loss associated with their takings, but rather are allowed to shift some of these costs to business owners, they undoubtedly will make economically inefficient decisions. Economic efficiency is achieved when the government is able to take economic resources and put them to a more productive use.<sup>501</sup> Government planners,

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<sup>499</sup> *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

<sup>500</sup> See *Jacksonville Expressway Auth. v. Henry G. Du Pree Co.*, 108 So. 2d 289, 293 (Fla. 1958) (Drew, J., concurring). This concurring justice stated:

The fact that the sovereign is now engaged in great public enterprises necessitating the acquisition of large amounts of private property at greatly increasing costs is no reason to depart from the firmly established principle that under our system the rights of the individual are matters of the greatest concern to the courts. The powerful government can usually take care of itself; when the courts cease to protect the individual—within, of course, constitutional and statutory limitations—such individual rights will be rapidly swallowed up and disappear in the maw of the sovereign. If these immense acquisitions of lands point to anything, it is to the continuing necessity in the courts of seeing to it that, in the process of improving the general welfare, individual rights are not completely destroyed.

*Id.*

<sup>501</sup> See W. BAXTER, *PEOPLE OR PENGUINS: THE CASE FOR OPTIMAL POLLUTION* 46 (1974), which states:

[T]he basic justification for taking the land at all is that it is more valuable to the community (including the owner) in the new public use than it is to the community in the privately profitable use to which the owner would put it. If this justification is truly available with respect to a given parcel, then it follows that the community can afford to pay the owner the market value of the land. For by assumption, the aggregate benefits that the community has received are greater in amount than are the marketable benefits which he could have produced by the alternative use, and those marketable benefits determine the

however, tend to consider only those costs associated with projects for which they are required to pay.<sup>502</sup> As long as the "just compensation" formula allows the exclusion of any of the components of the loss suffered by the property owner, government bodies will engage in inefficient decision-making.<sup>503</sup> Thus, denying recovery for business losses skews the cost-benefit analysis and encourages projects to go forward which, in true economic terms, are not rational.<sup>504</sup>

Commentators have criticized the current standard of measuring just compensation by the market value of the property taken as promoting inefficiency in eminent domain actions, because it encourages the government to ignore some of the real costs of the taking.<sup>505</sup> Professor Durham has argued that the losses suffered by owners whose lands have been taken fall into five categories: "replacement of the land and improvements taken; relocation, including moving costs, and the termination and startup costs of utilities and other services; lost current business revenue; lost business goodwill or value; and any specific demoralization costs."<sup>506</sup> He defines the first four categories as the "opportunity costs" suffered by the owner,<sup>507</sup> and contends that economically efficient just compensa-

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market value of the land. The requirement of compensation therefore imposes a test on the good faith of members of the community: do they really believe that the value of the land, when put to the public use, is greater than its private value? If they do, they gain by condemning it, even though they must pay. If they do not, they should not condemn it.

*Id.*

<sup>502</sup> See Blume & Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CALIF. L. REV. 569, 620-22 (1984); Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 420 (1977).

<sup>503</sup> As Durham points out, we also cannot rely upon the political system to promote efficient results because of problems of inadequately informed electorates and legislatures, and corrupt decision-making processes. Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, 69 MINN. L. REV. 1277, 1293-1300 (1985).

<sup>504</sup> As Professor Michelman stated, we need to resist the notion:

that compensation payments must be limited lest society find itself unable to afford beneficial plans and improvements. What society cannot, indeed, afford is to impoverish itself. It cannot afford to instigate measures whose costs, including costs which remain "unsocialized," exceed their benefits. Thus, it would appear that any measure which society cannot afford or, putting it another way, is unwilling to finance under conditions of full compensation, society cannot afford at all.

Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1181 (1967) (footnotes omitted).

<sup>505</sup> See, e.g., Durham, *supra* note 503, at 1300-01; Munch, *An Economic Analysis of Eminent Domain*, 84 J. POL. ECON. 473, 479-80 (1976).

<sup>506</sup> Durham, *supra* note 503, at 1305 (footnotes omitted).

<sup>507</sup> See *id.* at 1305 n.171 ("The fact that the condemnor in an eminent domain proceeding

tion would mandate that these costs be factored into the government's cost-benefit analysis and that compensation be provided.<sup>508</sup> The problem, of course, is that the traditional rule excludes business losses from the compensation equation.

Denial of recovery of these losses not only renders the taking decision economically inefficient, it also increases the demoralization costs associated with the project. Professor Michelman defined "demoralization costs" as:

the total of (1) the dollar value necessary to offset disutilities which accrue to losers and their sympathizers specifically from the realization that no compensation is offered, and (2) the present capitalized dollar value of lost future production (reflecting either impaired incentives or social unrest) caused by demoralization of uncompensated losers, their sympathizers, and other observers disturbed by the thought that they themselves may be subjected to similar treatment on some other occasion.<sup>509</sup>

As Professor Michelman noted, the problems inherent in attempting to put dollar values on factors such as "outrage" or "loss of incentive" make it difficult to ascertain the demoralization costs engendered by specific projects or action.<sup>510</sup> Thus, we must "frame the question about demoralization costs in terms of responses we must impute to ordinarily cognizant and sensitive members of society."<sup>511</sup>

The demoralization costs associated with business losses are obvious. As the cases brought by outraged business owners indicate, business interests are perceived by the public as legitimate and real property interests, and damage to them is likewise perceived as a

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is not required to show that his use of the land will be more valuable than the present owner's, but only to render compensation, will result in inefficient land uses if required compensation is not equal to the opportunity costs of the land seized.") (quoting R. POSNER, *ECONOMIC ANALYSIS OF LAW* 42-43 (2d ed. 1977)).

<sup>508</sup> *Id.* at 1305-06.

<sup>509</sup> Michelman, *supra* note 504, at 1214 (footnote omitted).

<sup>510</sup> *Id.* at 1215. Professor Michelman further stated that:

it obviously will not do to interview every potential compensation claimant and ask him how demoralized he expects to be if a given measure is adopted without provision for compensation . . . . The interviewee probably will not himself know the answer to the question (putting aside the difficulty of his attaching a dollar value to his outrage and his loss of incentive even if he could appraise those subjectively) and, for strategic reasons, would not reveal the true answer if he knew it.

*Id.*

<sup>511</sup> *Id.* at 1215-16.

real injury. Members of the public expect to receive compensation when such an injury is inflicted upon them.

Government officials should be concerned with the effect that these perceptions may have on property owners. For example, if business owners perceive that their property can be taken and their business destroyed, with only partial compensation being paid, their incentives to continue devoting capital and labor to those businesses are accordingly diminished. This disincentive can have particularly disastrous effects in inner-city neighborhoods where many businesses may be only marginally viable. If the business owner believes that the property is likely to be taken in the near future, he or she may abandon it prematurely, further spurring urban decay. Perhaps if the property is actually taken, the government does not care about this waste of resources.<sup>512</sup> But what if the business owner has guessed incorrectly about the government's intentions to take the land? A business that would otherwise contribute to the economic stability and vitality of the area will have been destroyed.

The arbitrary excluding of some of the very real components of the value of property from the compensation equation creates an inconsistency and unfairness in the law that cannot help but result in public perceptions of illegitimacy. This is perhaps the strongest reason for rejecting the business losses rule. Refusing to compensate the landowner fully for the costs of condemnation by denying him or her recovery for business losses shifts some of the costs of that project to the owner. If the public desires a project, it should be willing to pay for all of the costs associated with that project. As the United States Supreme Court recognized in *Almota*, the "constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness as it does from technical concepts of property law."<sup>513</sup>

Although the current rationale for the business losses rule is often unarticulated, and its historical basis has been discredited, the rule remains, an anachronism with the power to inflict great injury on business owners. Few Americans would agree with a statement made by the Rhode Island Supreme Court in 1930 to the effect that "any incidental loss or inconvenience to the business [resulting

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<sup>512</sup> In fact, it could be argued that such a result would promote economic efficiency.

<sup>513</sup> 409 U.S. 470, 478 (1973) (citation omitted) (quoting *United States v. Fuller*, 409 U.S. 488, 490 (1973)); see also *Armstrong v. United States*, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

from a taking of the underlying land] must be borne by the owner in the interest of the general public."<sup>514</sup> Yet that is precisely the result we find. A legal rule that has been vilified even by the very judges enforcing it as being "an immoral, illogical concept" that "should be declared illegal"<sup>515</sup> can hardly foster respect for the law among the general populace.

## VI. CONCLUSION

The past two decades have seen several reforms in the business losses rule, emerging at both the state legislative and judicial levels. We should now be attempting to identify the lessons that can be drawn from the progress made in these states. Further reform is necessary; how should it be fashioned?

The legislative reforms enacted to date are inadequate. They tend to be piecemeal and inconsistent, affording recovery to certain favored property owners, and denying it to others. Often, the availability of recovery depends upon the purpose to which the taken property will be put or upon whether the taker was a government entity—considerations that should be irrelevant to the just compensation equation. Either a taking of a recognized property interest has occurred or not; neither the use to which the property will be put nor the identity of the taker matters. Moreover, the legislative reforms we have seen do not address the normative problems of denying recovery for a real, but nonphysical, loss. How can the legislature logically justify denying recovery to most business owners, while simultaneously granting it to a few?

Although legislative reform may prove beneficial to certain aggrieved landowners, true reform must come from the judicial level. Yet the judicial reforms we have seen also tend to be unsatisfactory. The courts are uncomfortable with giving relief, largely because of their concern over the public fisc, but they are uncomfortable with denying it as well. As a result, no coherent judicial

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<sup>514</sup> *State Airport Comm'n v. May*, 51 R.I. 110, 112, 152 A. 225, 226 (1930); *see also* *Buckhannon & N. R.R. v. Great Scott Coal & Coke Co.*, 75 W. Va. 423, 446, 83 S.E. 1031, 1040 (1914) ("Incidental loss or inconvenience in business, resulting from removal or changes made necessary upon the taking of the property, . . . must be borne by the owner for the sake of the general good; and are not the subject of damages in condemnation.") (citations omitted).

<sup>515</sup> *In re Park Street (Lido Blvd.)*, Town of Hempstead, 71 Misc. 2d 554, 562, 336 N.Y.S.2d 566, 575 (N.Y. Sup. Ct. 1972), *rev'd*, 43 A.D.2d 45, 349 N.Y.S.2d 422, *aff'd sub nom.*, *Colony Beach Club, Inc. v. County of Nassau*, 39 N.Y.2d 958, 386 N.Y.S.2d 886, 353 N.E.2d 849 (1976).

theme is emerging from the reforms we do see. The courts adhere to a common pattern—they grant recovery in one opinion, and then systematically limit the availability of that recovery in subsequent opinions.

The repeated attempts by courts unwilling to reject the rule to pass responsibility for the problem to the legislature result only in the perpetuation of an illegitimate legal rule—a rule originally articulated by the courts themselves and not by the legislatures. It is not unreasonable, then, to expect that change to come from the judiciary.<sup>516</sup> Such a radical step as Louisiana's constitutional reform is not necessary. If the courts would simply reexamine the continuing relevance of the *per se* rule prohibiting recovery of business losses in view of the economic and legal developments that have occurred since the rule's origin, they would be compelled to achieve the same result.

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<sup>516</sup> As the former Chief Justice of California stated:

If the court adheres to *stare decisis*, as it is wont to do, with an aloof statement that the question is one for the legislature—although it is one created by judicial decision—it creates not only a new halo for the old precedent but a rule that it is not within the province of the court to make a change. Thus doubly haloed such precedents become judicially untouchable, surviving more grandly than ever in the headnotes. They are grotesque tokens of the triumph of magic words over judicial responsibility.

Traynor, *No Magic Words Could Do It Justice*, 49 CALIF. L. REV. 615, 622 (1961).